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ABBREVIATIONS USED.—A, B, C means two or more cases on page; a, criticised; d, distinguished; e, explained; f, followed; g, limited; h, modified; o, overruled; p, parallel case; q, qualified; s, same case; w, wrong citation or application; small figures indicate the section to which reference applies; \* indicates reference is to a point not mentioned in syllabus.







*June 19 28*

**REPORTS**

**OF**

**CASES AT LAW AND IN CHANCERY**

**ARGUED AND DETERMINED IN THE**

**SUPREME COURT OF ILLINOIS.**

---

**VOLUME 182.**

**CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER,  
1899, AND CASES IN WHICH REHEARINGS WERE DE-  
NIED AT THE DECEMBER TERM, 1899.**

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**ISAAC NEWTON PHILLIPS,  
REPORTER.**

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# CASES

## ARGUED AND DETERMINED

### IN THE

# SUPREME COURT OF ILLINOIS.

---

THE NORTH CHICAGO STREET RAILROAD COMPANY

v.

GEBHARDT W. ZEIGER.

*Opinion filed October 19, 1899.*

1. **STREET RAILWAYS**—*person may lawfully drive carriage on tracks.* One may lawfully drive his carriage in the car tracks if he exercises due care not to unduly interfere with the rights of the railway and to avoid a collision, and may recover for an injury received while so driving, and due to the negligence of the railway company.

2. **DAMAGES**—*expense of procuring competent help during disability is a proper element.* The expense incurred by an injured person to procure competent help in his business to do the work which would have been performed by himself had he not been disabled, is, if pleaded, a proper element of damages.

3. **SAME**—*when Appellate Court may refuse to set aside verdict.* The Appellate Court, in a suit for personal injuries, may refuse to set aside the verdict as excessive unless the amount justifies an inference that it is the result of partiality, prejudice or passion.

4. **INSTRUCTIONS**—*when use of word "will" is not mandatory.* An instruction that the jury "will" find a verdict for the plaintiff if he has proved the material allegations of his declaration by a preponderance of the evidence, does not, by the mere use of such word "will," tend to deprive the jury of their freedom of action or invade their province.

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10 NORTH CHICAGO STREET R. R. CO. v. ZEIGER. [182 Ill.

5. EXPERT WITNESSES—*physician cannot refuse to testify because not promised extra fees.* A physician subpoenaed and interrogated as an expert witness only, cannot refuse to testify upon the ground that no compensation greater than that allowed to ordinary witnesses has been paid or promised to him.

*North Chicago Street R. R. Co. v. Zeiger*, 78 Ill. App. 463, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

This is an action by Gebhardt W. Zeiger to recover damages for personal injuries and for expenses to which he was put, together with damages for injuries to property, alleged to have been sustained by him by reason of the negligence of the North Chicago Street Railroad Company.

The declaration alleges that on the 29th day of December, 1894, while the plaintiff was riding with due care in a carriage on North Clark street near Belden avenue in a southerly direction, one of the defendant's cable cars south-bound negligently struck the carriage, thereby overturning it and throwing plaintiff to the ground, causing the injuries complained of and putting him to the expenses alleged.

As appears from the evidence, on the evening in question the plaintiff with two ladies was riding in a carriage drawn by one horse south-bound on Clark street. While doing so the carriage was struck by a train of the defendant. Whether such collision was the result of the negligence of the defendant, while the plaintiff was in the exercise of ordinary care, is the main issue involved. At the trial the jury found a verdict in favor of the plaintiff, and assessed his damages at \$5000, and judgment having been entered on the verdict, the defendant took an appeal to the Appellate Court, where the judgment has been affirmed. The present appeal is from such judgment of affirmance.

EGBERT JAMIESON, and JOHN A. ROSE, for appellant.

LACKNER, BUTZ & MILLER, for appellee.

Per CURIAM: The Appellate Court, in deciding this case, delivered an opinion, which is, in part, as follows:

"The theory of the defendant is that the carriage had cleared the track and was at a safe distance before the train was moved up to and partly passed it, and that, while the train was slowly moving along, the plaintiff's horse became unmanageable and backed or plunged the carriage against the train, whereby the injuries resulted. On the other hand, plaintiff's theory is that before the carriage had fully cleared the track, and while the left hind wheel was still in the track, the car, moving with negligent rapidity, caught the wheel and shoved the carriage around until it was nearly turned about, so as to make it face in a direction nearly opposite to that in which it was going, and finally upset it, thereby occasioning the alleged injuries.

"A studious consideration of the record brings us to the conclusion that the plaintiff's theory is sustained by the preponderance and weight of evidence. The plaintiff had the lawful right to drive his carriage in the car tracks, in the exercise by him of due care to avoid an undue interference with the right of the defendant and to avoid a collision, and while so driving, the law surrounded him with its protection against such a negligent operation by the defendant of its tracks as would inevitably lead to the injury of the plaintiff. (Booth on Street Railways, sec. 316.) Whether the plaintiff was in the exercise of due care, and whether the defendant was guilty of negligence, under the circumstances, were questions of fact for the jury, under the evidence, and having been found against the defendant, with, as we have above said, the weight and preponderance of the evidence on the side of the findings, the verdict ought not to be disturbed.



"It cost the plaintiff \$104 to repair the carriage, and the surgeons were paid by him \$450, and there was some other small expense, about none of which matters was there dispute. The plaintiff was a wholesale butcher and employed twenty-five men. The first time he was able to drive down to his place of business was April 4 or 5,—a little over three months after the accident,—and it was necessary for him to employ a superintendent for five months from the time of the accident, which he did at a cost of \$1000 for salary paid.

"The argument of defendant's counsel against the admissibility of the testimony relative to what the plaintiff paid for a superintendent, and the necessity for employing a superintendent, is based wholly upon the original record filed in this court, and not upon the full record made in the circuit court. By a supplemental record brought here after defendant's brief was filed, there was brought up an additional count to the declaration, which, had it been here in the first instance, would have doubtless spared the point, that there was no basis made by the pleadings for such proof. Such additional count specially alleged plaintiff's particular damages in such respect, and the facts upon which they were claimed, and was a good basis for the evidence. The expense necessarily incurred by a plaintiff so disabled, in procuring competent help in his business to do the work which would have been performed by himself had he not been disabled, was a proper subject of allowance for damages in this character of suit. *Ashcraft v. Chapman*, 38 Conn. 230.

"An appellate tribunal will not disturb a verdict in a suit to recover for personal injuries, merely because it would have assessed the damages at a less amount if it had been sitting as a jury. It is only where the verdict in such cases is so out of the way as to justify an inference that it is the result of partiality, prejudice or passion, that the duty of an appellate court arises to set aside the verdict. But in this record there is nothing to

be found to justify such an inference. The case seems to have been fairly and deliberately tried and full consideration given to every defense the defendant interposed, and though the verdict is full in amount, it can not be said to be palpably wrong.

"Error is assigned, and argued, because of the giving of two of plaintiff's instructions, in that, as it is said, one of them, by using the word 'will' instead of 'may,' practically directs the jury to find a verdict for the plaintiff in case they find that he has proved the material allegations of his declaration by a preponderance of the evidence; and in the other, it in substance tells the jury it is their 'duty,' in case they find the defendant guilty, to determine, from the evidence, the amount of the damages, if any, which, under the evidence, he is entitled to recover, and if the jury find, from a preponderance of the evidence, that plaintiff is entitled to recover substantial damages, they 'will' (instead of 'may') fix the amount thereof, etc. In other words, as applicable to each instruction, it is argued that the words 'will' and 'duty,' as there employed, were mandatory and coercive upon the jury, and tended to deprive the jury of their freedom of action in the matter, and were, as used, an invasion by the court of the province of the jury. To tell a jury that, if they find from the evidence the plaintiff has, by a preponderance of the evidence, proved the material allegations of his declaration, their verdict 'will' (instead of 'may') be in his favor, is to state the law, and cannot, by any fair understanding of words, be an invasion of the province of the jury. 'May' could not, in such connection, properly be understood in the alternative, as 'may' or 'may not,' for, under the premise of the instruction, there was but one proper thing for the jury to do, and that was to find for the plaintiff. Had the word 'may' been used instead of 'will,' it would have stood for and meant the same thing as 'will,' if rightly understood by the jury.

"Very much the same reasoning applies to the use of the words 'duty' and 'will,' in the connection in which they were used in the second instruction, and it is unnecessary to elaborate upon it. The cases cited and relied upon by appellant in this connection are not, as we understand them, parallel to this one, and our holding is in no sense inconsistent with them, but, on the other hand, is in harmony with them.

"While it is exceedingly important and vitally essential to the preservation of the right of trial by jury that the jury's province should not be usurped by the trial judge, it is no less important and essential that the functions of the judge should be preserved and exercised, and to instruct the jury as to what the law demands of them when all the facts and conditions precedent to the demand of the law have been rightfully found by the jury to exist, can, in our view, never be error. For illustration we refer to *Chicago, Burlington and Quincy Railroad Co. v. Payne*, 59 Ill. 534, *City of Aurora v. Hillman*, 90 id. 61, and there are many others.

"Neither was there error in the refusal of defendant's instruction numbered 28, that the law will not require an expert witness (a physician and surgeon in this case) to testify in a case unless he is paid the usual fees of expert witnesses of his class and character, etc. This question has lately been settled by our Supreme Court in *Dixon v. People*, 168 Ill. 179, holding that a physician, subpoenaed and interrogated as an expert witness only, cannot refuse to testify, in either a civil or criminal suit, upon the ground that no compensation greater than that allowed to ordinary witnesses has been paid or promised to him.

"We perceive no reversible error upon the record, and the judgment of the circuit court is affirmed."

We concur in the conclusion reached by the Appellate Court, and in the views expressed by them as above quoted. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

JOHN MARKS.

*Opinion filed October 25, 1899.*

1. **PLEADING**—*when declaration states a cause of action for negligence.* A declaration states a cause of action which alleges that plaintiff was a passenger on defendant's street car, and that, while using ordinary care for his safety, the defendant negligently and without warning ran its car so near a fixed structure that there was not room for passengers on the foot-board to ride in safety, and that plaintiff, not knowing of such structure, was struck and injured.

2. **TRIAL**—*when instruction to jury after retirement is not erroneous.* In an action against a street railway company by a passenger injured by striking against a viaduct, an instruction by the court, in response to a communication from the jury, after retirement, expressing their opinion that the city and not the company was at fault, that the jury should not consider the city's liability, is not erroneous, where that question was not involved under the issues.

*West Chicago Street Railroad Co. v. Marks*, 82 Ill.App. 185, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

This is an action by appellee, against appellant, to recover for personal injuries received by him while a passenger on one of defendant's cable cars. The declaration contains two counts, in the first of which it is alleged that defendant suffered plaintiff to ride on its cars in a dangerous place, to-wit, on the left-side step of a summer car, standing room on such car step being the best accommodation afforded when plaintiff was received and conveyed as a passenger, and while plaintiff was in this position the defendant demanded and received fare, and the car, on moving along the track, passed so near a permanent obstruction near which the track was laid, that the plaintiff was struck and injured whilst using due care and caution, and without knowledge of any such

obstruction, and without any signal or warning from defendant of such obstruction. The second count alleges that the defendant received the plaintiff as a passenger, and supplied and furnished him with an unsafe and dangerous position on its car, by reason of which the plaintiff came in contact with a permanent obstruction placed so near the track that plaintiff was injured.

The evidence showed that on July 26, 1896, the defendant had on its track open cars, along each side of which were running-boards, which, though designed as a step to mount to said cars, were nevertheless often used by passengers to stand upon, sometimes when there was no room elsewhere in the train, and sometimes from choice. The evidence shows that at the time plaintiff sought to take a place on the car the seats were all occupied, as well as the aisles and places between the seats, as also the running-board on the right-hand side, and that the plaintiff, with others, took a position on the left-hand running-board. The conductor testified that he did not remember warning or notifying plaintiff of any peculiar danger, and states "it is a very common thing to ride on the foot-board; we don't say anything to them; we just let them ride there if they want to; we don't tell them anything about this viaduct they are approaching." The distance of the car from the stationary object is between twelve and nineteen inches. The testimony is to the effect that there was no danger in riding on the foot-board where one knew of the existence of the stationary object so near, as it could be avoided by standing close against the car.

After the jury retired to consider the evidence and to return their verdict they sent a communication to the court, as follows: "The city built the bridge and takes care of repairing it, and the city railway company pays license for its cars to go across, and that, in my estimation, the city is in fault and not the railway company." In response to that communication the court sent a writ-

ten instruction, as follows: "With reference to the communication hereto attached, which the court has received from the jury, the court instructs the jury that they must decide this case upon the law, and the evidence as they have heard it from the witnesses who have testified in this case, and they should not go outside of the evidence in deciding the issues submitted to them. Whether the city is liable or not is not a question before the jury, and they have nothing to do with it and should not consider it."

A verdict and judgment for \$1500 were entered by the trial court, which, on appeal to the Appellate Court for the First District, were affirmed. This appeal is prosecuted, and the errors relied on are entering judgment on a defective declaration and the giving of the instruction in response to the communication from the jury.

VANVECHTEN VEEDER, for appellant.

A. P. PICHEREAU, and BURTON & REICHMANN, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

It sufficiently appears from the allegations of the declaration that the plaintiff became a passenger on the defendant's cars and the latter did not use proper care to see that the former should be carried safely; that it negligently ran its cars so near to a fixed structure that there was not room enough, unless standing very close to the car, when riding on the foot-board, to be carried in safety, and that the plaintiff did not know of the existence of the fixed structure and was not warned of it by the defendant, and whilst using due care and caution for his own safety was unavoidably struck and injured. We are of opinion that the declaration stated a cause of action.

The answer of the judge by giving an instruction to the jury in response to their communication was not error.

The jury had nothing to do with the relationship existing between the city of Chicago and the appellant with reference to the use of the viaduct, nor as to whether the tracks were situated, with reference to the obstruction, in the position they were by the direction of the municipality. That question was not involved in the case submitted to them under the issue, and it was not error for the court to so instruct them.

We find no error in the record, and the judgment of the Appellate Court for the First District is affirmed.

*Judgment affirmed.*

---

SWIFT & Co.

v.

VINCENTZ RUTKOWSKI.

*Opinion filed October 19, 1899.*

1. VARIANCE—a variance should be taken advantage of at the trial. A party who fails to object to evidence when offered, on the ground of variance, and to point out such variance, waives the objection.

2. PLEADING—pleading to merits waives right to move to eliminate counts as insufficient. A defendant, after pleading to the merits, cannot question the sufficiency of the counts of the declaration by a motion to eliminate them from the case or to exclude the evidence from the consideration of the jury.

3. APPEALS AND ERRORS—when refusal to instruct jury to disregard counts is not reversible error. The court's refusal to instruct the jury to disregard counts of the declaration is not reversible error when it contains one or more good counts sufficient to sustain the judgment to which the evidence is applicable.

4. SAME—whether verdict is against weight of evidence is not for the Supreme Court. Whether a verdict in a suit at law is against the weight of evidence presents a question for the determination of the Appellate Court, but not for the Supreme Court.

5. SAME—question of proximate cause of injury is one of fact. Whether the negligence of the defendant was the proximate cause of the injury complained of is a question of fact settled by the Appellate Court's judgment of affirmance, where there is evidence tending to sustain such finding.

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6. EVIDENCE—*permitting exhibition of injury is not ground for reversal, in absence of abuse of discretion.* In the absence of abuse of discretion, a ruling of the circuit court permitting the defendant, in an action for personal injuries, to exhibit his injured arm to the jury, will not be disturbed by the Supreme Court.

7. TRIAL—*one cannot complain of rulings in his own favor.* An appellant cannot complain of remarks made by opposing counsel in his closing argument, where the objection of appellant's counsel thereto was sustained by the court.

*Swift & Co. v. Rutkowski*, 82 Ill. App. 108, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE A. TRUDE, Judge, presiding.

This was an action brought by appellee, a minor aged fourteen years, against Swift & Co., to recover for a personal injury received while in the employ of the defendant at its packing house at the Union Stock Yards in Chicago, on the 30th day of June, 1892. A trial before a jury resulted in a verdict and judgment for plaintiff of \$5000, which, on appeal, was reversed in this court on account of an erroneous instruction. (*Swift & Co. v. Rutkowski*, 167 Ill. 156.) The cause having been remanded, a second trial resulted in a verdict and judgment for plaintiff for \$2200, which was affirmed in the Appellate Court, and the defendant appealed to this court.

On the second trial the cause was submitted to the jury on a declaration consisting of five counts. The second count, filed January 28, 1896, charged the defendant with failure to use due care to employ a sufficient number of fellow-servants for plaintiff. The first count, filed July 15, 1897, charged defendant with not using due care to supply plaintiff with a sufficient number of fellow-servants; that plaintiff notified defendant of that fact; that defendant promised plaintiff to furnish a sufficient number of fellow-servants; that plaintiff relied on the promise; that defendant failed to keep the promise. The second count, filed July 15, 1897, charged the defendant



with failure to use due care to furnish plaintiff with sufficient help; that plaintiff notified defendant of that fact; that defendant insisted plaintiff must do his work alone and urged on plaintiff to his work, and that plaintiff, on being so ordered by defendant, obeyed defendant and returned to his work, and that defendant failed to furnish the necessary additional help. The third count, filed July 15, 1897, charged the defendant as in the preceding second count, and adds thereto the promise of defendant to furnish additional help, and that it failed to keep the promise, and that plaintiff was ignorant of the dangers of doing the work alone. The fourth count charged defendant with failure to furnish plaintiff with sufficient help; that it was dangerous for plaintiff to do his work alone; that he was ignorant of the dangers; that defendant failed to notify, instruct and warn plaintiff of the dangers of his work. All the counts allege that plaintiff was injured by reason of the several acts of negligence charged. To all the counts the defendant filed the general issue.

In the opinion of the Appellate Court the leading facts established on the trial are stated, as follows: "Appellee's work consisted in cutting with a knife a thin fell, about the thickness of a newspaper, which lies over the fat of the peck, (a part of the paunch,) and then pulling off the fat with the hands. The pecks were trimmed while lying on the floor, and while trimming the appellee ordinarily stood in a stooping position, with his face toward the floor and his eyes and attention directed there upon his work. Appellee had worked for appellant, trimming pecks, for about a month previous to the accident. For the first two weeks of his employment three boys were trimming pecks. For the next two weeks two boys, one of whom was the appellee, trimmed the pecks until about three hours before appellee's injury, when appellee was required to do the work alone. On this latter point there is a conflict in the evidence, but we think it justifies a finding that at the time appellee was injured he

was working alone trimming pecks and by direction of appellant's foreman, and that while working alone he could not and did not keep up the work and gradually fell behind, until, while doing his work and in the usual stooping position, he was struck in the back by a carcass of beef which was being hoisted from the floor onto a hoist, and a knife held by appellee in his right hand was driven into his left arm, cutting it so severely that he is unable to use it and is permanently injured. It is further shown that with two or three boys trimming pecks the work was always safe to do and entirely free from danger, because such a number of boys was sufficient to keep the work up and be always thirty or forty feet away from the men moving or lifting the carcasses of beef or doing other work whereby the boys trimming pecks might be struck and injured. One boy could not safely do the work alone, because he could not work rapidly enough to keep the work up and would fall behind. As he fell behind the work became dangerous because of his coming in close proximity to the men moving and hoisting the carcasses of beef, and the liability to be thereby struck or hit by a moving carcass while working with a sharp knife used in trimming pecks. It is further shown, as we think, by the preponderance of the evidence,—at least it is not against the manifest weight of the evidence,—that the failure to employ another boy to trim pecks at the time appellee was injured was the proximate cause of his injury; that the appellee was injured through no fault of his own; that he did not appreciate or understand the danger to which he was exposed while trimming pecks alone; that appellant knew appellee was left alone at the time he was injured; that appellee went to Ledo Young, the foreman of appellant, and objected to doing the work alone, and Young promised to get more help; that Young did not do so, and appellee again went to Young and asked for additional help, and that Young told him that he (Young) would help him; that appellee,

relying thereon, returned to his work; that no help was furnished, and shortly thereafter appellee was struck by a swinging carcass of beef and severely injured."

JOHN A. POST, and O. W. DYNES, for appellant.

E. S. CUMMINGS, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It is first insisted that there was a variance between the declaration and the evidence, and on that ground the court should have excluded from the consideration of the jury the second count of the declaration of January 28, 1896, and the second and fourth additional counts of July 15, 1897. At the close of plaintiff's evidence defendant's counsel moved the court "to eliminate these counts from the consideration of the jury, and to exclude all evidence in the case as to these counts, upon the ground of variance," which motion the court overruled. It is a well settled rule that a party desiring to take advantage of a variance between the declaration and the evidence should object to the evidence when offered and point out wherein the variance consists, so that the other party may amend the declaration and thus avoid the objection. If this course is not pursued the objection to the evidence will be regarded as waived. (*Swift & Co. v. Madden*, 165 Ill. 41; *Westville Coal Co. v. Schwartz*, 177 id. 272.) Moreover, the plaintiff did not rely exclusively on the counts objected to, but relied on other counts of the declaration under which it is not pretended the evidence was inadmissible. If the evidence was admissible under any one count of the declaration it could not be excluded. The rule laid down in *Chicago, Burlington and Quincy Railroad Co. v. Warner*, 108 Ill. 538, applies here. It is there said (p. 548): "It is also contended the plaintiff failed to prove his case as laid in the declaration, and that the court therefore erred in not excluding the evidence from the jury. We do not concur in this view. The mistake of appellant on

this branch of the case is in assuming that appellee bases his right of recovery exclusively upon 'the original improper construction of the car.' It is true the declaration proceeds upon this theory, but not upon this theory alone, for, as already shown, it is expressly averred in the amended declaration that it was the duty of the defendant 'to furnish for the use of its employees properly and carefully constructed cars, with end ladders, side handles and steps attached thereto,' and the declaration further on expressly negatives the performance of this duty. This being so, the plaintiff was not bound, at his peril, to prove both branches of his case. It was sufficient if he proved either. It is a familiar doctrine of the law that all torts are severable, and therefore, in an action *ex delicto*, it is immaterial that all the averments of the declaration are not proved as laid. It is sufficient if such of them as are so proved show a good cause of action. Applying this principle to the question in hand, the position of appellant is clearly not tenable. To the suggestion the declaration was fatally defective, and the motion to exclude the evidence should therefore have been sustained, it is sufficient to say that the defendant, by pleading to the merits, admitted the sufficiency of the declaration, and it is not readily perceived how its sufficiency could be subsequently raised by a mere motion to exclude the evidence from the jury. We are aware of no practice authorizing such a course. If the defendant desired to question the sufficiency of the declaration it should have demurred, or moved in arrest of judgment. (*Chicago, Burlington and Quincy Railroad Co. v. Harwood*, 90 Ill. 425; *Roberts v. Corby*, 86 id. 182.) Having done neither, it is unnecessary to determine whether the plaintiff was bound to aver in the declaration he had no notice of the defective construction of the car, as the declaration was clearly sufficient after verdict." Here, as in the case cited, the defendant pleaded to the counts in question, and their sufficiency cannot be raised by motion to elimi-

nate them from the case or exclude the evidence from the consideration of the jury.

It is also claimed that the court erred in refusing to instruct the jury to disregard the second additional count of the declaration, filed January 28, 1896, and the second and fourth additional counts filed July 15, 1897. It is conceded that the declaration contains one or two counts which are good and to which the evidence is applicable, and that these counts, or one of them, are sufficient to sustain the judgment. Where such is the case, it was expressly held in *Consolidated Coal Co. of St. Louis v. Scheiber*, 167 Ill. 539, that the refusal of the court to instruct the jury is not reversible error. The same rule was declared in *Chicago and Alton Railroad Co. v. Anderson*, 166 Ill. 575, and the rule established in those cases must control here.

It is argued at some length in the briefs that the verdict is against the weight of the evidence. That was a question properly before the Appellate Court, but it does not arise here.

It is also claimed that the alleged insufficiency of help was not the proximate cause of plaintiff's injury. Upon an examination of the evidence bearing on this question it will be found that it fairly tends to prove that if more help had been furnished to assist in the work plaintiff was required to perform, as the evidence tends to prove appellant promised appellee should be furnished, appellee would have been removed from the place where the beef was hoisted, and hence would not have been exposed to the danger which resulted in the injury. But however that may be, whether the negligence of appellant was the proximate cause of the injury was a question of fact, which was settled by the judgment of the Appellate Court affirming the judgment of the circuit court. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, and cases cited.

It is also claimed that the court erred in allowing the appellee to exhibit his injured arm to the jury. Whether the trial court will permit an injured limb to be exhib-

ited to the jury for any proper purpose is a matter within the discretion of the court, (*Chicago and Alton Railroad Co. v. Clausen*, 173 Ill. 100,) and unless there has been an abuse of discretion the ruling of the circuit court will not be disturbed. Here it is manifest, in view of the verdict, that no injury resulted from the ruling of the court on the question.

Objection is made to certain remarks of counsel for appellee in his closing argument to the jury. The record shows that the objection of appellant's counsel was sustained by the court. The ruling of the court, therefore, being in appellant's favor, appellant cannot be heard to complain.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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FRANK X. WERLING *et al.*

*v.*

EMILY E. INGERSOLL *et al.*

*Opinion filed October 19, 1899.*

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This case is controlled by the decision in *City of Chicago v. McGraw*, 75 Ill. 566, which holds that the State of Illinois is not the owner of the strip of land ninety feet wide along and contiguous to the south margin of the Illinois and Michigan canal through section 10.

APPEAL from the Circuit Court of LaSalle county;  
the Hon. CHARLES BLANCHARD, Judge, presiding.

LINCOLN & STEAD, for appellants.

Per CURIAM: This is an action of trespass, instituted in the circuit court of LaSalle county by Emily E. Ingersoll and George Ingersoll, appellees, against Frank X. Werling and Eugene Smith, appellants, to recover damages for removing the fences and entering the close of appellees.

The declaration consists of one count. It alleges, in substance, that the defendants, (appellants,) with force and arms, on, to-wit, the thirteenth day of November, 1897, and on divers other days, broke and entered certain closes of the plaintiffs, (appellees,) situate in the county of LaSalle, and then and there removed and destroyed, to-wit, one hundred and fifty rods of fence, of the value of \$1000, and other wrongs then and there did against the peace of the People, etc., and to the damage of the plaintiffs of \$1000. To this declaration no formal pleas were filed. By stipulation all questions of pleading are waived, and it is agreed that any and all evidence competent to establish a cause of action or a defense shall be treated in the same manner, and be given the same force and effect, as though all proper pleas had been filed and properly pleaded.

Under the stipulation the issues in this case are limited, and confined to a single question, viz.: Is the State of Illinois the owner of a strip of land ninety feet in width along and contiguous to the south margin of the Illinois and Michigan canal, through section 10? If the State is the owner of this ninety-foot strip, it is stipulated and agreed that this suit cannot be maintained. If the State is not the owner of this ninety-foot strip, it is stipulated and agreed that appellants were guilty of a trespass.

A jury was waived and the case was submitted to the court for trial without a jury. The findings of the court below were in favor of the appellees, and judgment was rendered in their favor against appellants. The present appeal is prosecuted from such judgment.

In *City of Chicago v. McGraw*, 75 Ill. 566, this court decided that the State is not the owner of the strip in question, ninety feet wide. We refer to that case for the reasons given in support of the conclusion so reached. It is unnecessary to repeat those reasons here.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

## THE POLISH ROMAN CATHOLIC UNION

v.

ANNA WARCZAK.

*Opinion filed October 25, 1899.*

1. **BENEFIT SOCIETIES**—*constitution of local lodge controls in case of conflict between it and constitution of head lodge.* The constitution of a local branch of a benefit society forms a part of a member's contract of insurance, and where there is no requirement that the constitution and by-laws of the subordinate societies must strictly conform to those of the association, which has no transactions with the members directly, the former governs in case of conflict.

2. **SAME**—*society relying on forfeiture must show that the constitution was strictly followed.* It is incumbent upon a benefit society to show that a forfeiture and suspension relied on as a defense to a suit for mortuary benefits were made in accordance with the constitution and by-laws of the society.

3. **TRIAL**—*when remarks by the court to witness are not objectionable.* Remarks made by the court in an endeavor to get the evidence before the jury in a manner to be understood by them are not objectionable where the witness testified in a foreign language.

4. **APPEALS AND ERRORS**—*when refusal of defendant's instructions is not erroneous.* Refusal of instructions requested by the defendant association in an action upon a benefit certificate is not error, when no defense against the *prima facie* case of plaintiff is made out.

*Polish Roman Catholic Union v. Warczak*, 82 Ill. App. 351, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

CZARNECKI & KORALESKI, for appellant.

JAMES H. WESTCOTT, Jr., for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Prior to April 18, 1894, appellant was a fraternal and benevolent society incorporated under the laws of this State, and made up of subordinate or branch societies, which were also incorporated, including branch No. 147,



known as St. Adelbert Society. The corporation was not incorporated for pecuniary profit. On April 18, 1894, the appellant issued a certificate to Thomas Warczak, to the effect that on his compliance with articles 13, 14, 16 and 20 of its constitution he would be entitled to all benefits and relief which should arise for each member of the death benefit treasury of the appellant. Warczak died November 6, 1896, leaving surviving his widow, who was the beneficiary, (the appellee here,) who brought suit, on the certificate of membership, to recover, by reason of the death of her husband as a member of the society, on the contract expressed in the certificate of membership. The principal defense to a right of recovery was that the plaintiff's husband was not, at the time of his death, a member of the defendant in good standing, and therefore not entitled to recover; that he had forfeited all his rights as a member because of non-payment of assessments when they became due. This was denied by the plaintiff, who also sought to show a waiver of any forfeiture, claiming that her husband was in good standing at the time of his death. On trial in the superior court of Cook county a verdict and judgment for the plaintiff were entered for \$657, which, on appeal to the Appellate Court for the First District, were affirmed. That court granting a certificate of importance, an appeal was prosecuted to this court.

By section 8 of the fourteenth article of the constitution of appellant it is provided that in case of the death of a regular member the mortuary fee shall amount to the sum of \$600. By paragraph 9 of the seventeenth article it is provided that if any member is in arrears for monthly dues, tickets or special collections for a longer period than six months his name shall be stricken thereby from the roll of membership. By article 23 provision is made for sick benefits, but it is provided by paragraph 8 of the article that any member who has not paid, at the end of three months, monthly dues, funeral benefits, con-

tributions, etc., nor received an extension of time, shall not receive sick benefits. The charter, constitution and by-laws of the society were in the Polish language.

By the constitution of the Polish Roman Catholic Union it is provided that a failure to pay any amount assessed within thirty days after notice forfeits all rights to the mortuary fees, but no provision is made for suspension or re-instatement. That constitution also provides that the subordinate societies must have a constitution for their internal government, and must be incorporated. There does not seem to be any requirement in the constitution of the union that the constitution and by-laws of the subordinate societies must strictly conform to the constitution and by-laws of the union, but inasmuch as the relations between the member holding the certificate are only through the subordinate society, and all transactions between the union and member necessarily being through that subordinate society, where there is a conflict between the constitution and by-laws of the union and the subordinate society the member is not required to look beyond his society, with which all of his transactions must be had. The constitution of the union making no provision for suspension or forfeiture for non-payment of dues, and the constitution of the subordinate society having such provision, as between the member and the society or union the constitution and by-laws of the society govern.

By the oral testimony on behalf of the plaintiff it appears that certain sums of money were offered to be paid as dues of the society and of the subordinate society, —the St. Adelbert Society,—and an offer was made to show that Warczak was ill before his death and was entitled to five weeks' sick benefits from that subordinate society. Extracts were read from the minutes of the St. Adelbert lodge, showing that a tender of \$9.75 was rejected and that the money was to be returned by the committee, and one of the members of the committee tes-

tified that the money was returned and was accepted by Warczak. The testimony shows action was taken with reference to the default in payment by him, and his suspension from the order, in June, 1896. The monthly account book issued by the society to Thomas Warczak shows payment of yearly dues to the union, and of the assessments levied monthly from the time of his admission in the society to April, 1896. It is contended that his name was stricken from the roll of membership in June, and two officers testify to that fact; yet it is undisputed that in September, 1896, he tendered the sum of \$9.75 in payment of all moneys due, which was in the first instance accepted.

In view of the provisions of the constitution, as contained in paragraph 9 of article 17, that if any member is in arrears for monthly dues, tickets or special collections of the society longer than six months his name shall be stricken thereby from the roll of membership, and of the uncontradicted evidence that Thomas Warczak has paid all assessments up to April, 1896, we cannot comprehend how he can be suspended for the non-payment of dues in June, 1896, when there is no provision in the constitution to which our attention has been called that authorizes an expulsion or suspension until after the expiration of that time. It is true that the constitution provides for the payment of monthly dues to the society, of all assessments for funeral benefits and other expenses, and to enforce prompt payment it is provided that three months' non-payment of any money due from a member shall prevent his receiving sick benefits or holding any office in the society, but that he may be granted an extension of time at the end of three months, if he make a request in writing therefor. The further provision of the constitution that if any member is in arrears for monthly dues, etc., longer than six months, his name is to be stricken thereby from the roll, would not authorize his suspension for the non-payment of dues in June, or pre-

vent his tender of \$9.75 from being a compliance with the requirements of the constitution and by-laws to pay all dues lawfully assessed, as it is not claimed that the dues due from him amounted to a greater sum than \$9.75, but that the money was refused because on the 16th day of June he had been suspended from the order for non-payment of assessments. Whilst there is no record showing any action on the part of the society, it does appear that a vote of the society was taken that he be suspended for the non-payment of assessments; nor does it appear when dues and assessments were payable, by anything shown in the abstract of the proceedings.

The Polish Roman Catholic Union was made up of sub-societies, which were required to pay it monthly assessments. It had no transactions with the members direct, but only acted through the sub-societies to which the members belonged. The constitution of St. Adelbert Society, of which the deceased was a member, became a part of his contract of insurance with the appellant union, in so far as his membership in that association was concerned.

By reason of the fact that the certificate was issued in which appellee was the beneficiary, and the death of Warczak, and the further fact that he had paid or tendered all dues or assessments against him up to and including June, 1896, appellee made out a *prima facie* case authorizing her to recover. No suspension could result by the non-payment of dues in June, 1896, as the book issued by the society to Warczak showed that he had paid in full, up to and including April, 1896. Neither is it shown that any money was due from Warczak which he did not pay or offer to pay in June, and any effort on the part of the St. Adelbert Society to forfeit his right or suspend him was wrongful and could not result in such suspension. Until he was in default in accordance with the provisions of the constitution and by-laws he was not to be subjected to suspension and forfeiture, and it is incumbent on the appellant to show that such suspen-

sion and forfeiture were made in accordance with the constitution and by-laws of the St. Adelbert Society. Not being liable to suspension in June, 1896, under the constitution and by-laws of the St. Adelbert Society, and the attempted suspension being a nullity, and having tendered all dues then owing, and having died November 6, 1896,—a period of less than six months from the month of June,—there could not be dues and assessments owing between June and November, and in arrears for such a length of time that his suspension would result by reason of the constitution of the society. The evidence on behalf of appellant presented no sufficient defense of the suspension or forfeiture of the rights of Warczak that could defeat a recovery by the holder of the certificate.

Whilst there are numerous alleged errors as to the admission and exclusion of evidence and in remarks of the court during the trial, without entering in detail into the objections thus made it is clear there was no error on the part of the court in the admission and exclusion of evidence or in the remarks made. In view of the exceeding difficulty in understanding the witnesses and the translations from a different tongue into English, the remarks of the court in endeavoring to get before the jury the subject matter in a manner to be understood by them was not error.

Some twelve instructions were asked by the defense, which were refused by the court, and their refusal is assigned as error. Without entering into a discussion of these instructions, it suffices to say that there was no error in their refusal, because of the fact the defendant failed to show either the fact of suspension or the right to suspend Warczak, and the defense against the *prima facie* case of the plaintiff was not made out. The court should have instructed the jury directly to find for the plaintiff the amount of the certificate, with interest.

The judgment of the Appellate Court for the First District is affirmed.

*Judgment affirmed.*

## THE PHENIX INSURANCE COMPANY

v.

## THE BELT RAILWAY COMPANY OF CHICAGO.

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f188	*520

182	83
118a	546

*Opinion filed October 19, 1899.*

1. **APPEALS AND ERRORS**—*demurrer is waived by pleading over.* A party waives a demurrer, and cannot assign error upon the action of the court in overruling it, when he does not abide by the demurrer but pleads over.

2. **SAME**—*whether insurance company waived proofs of loss is a question of fact settled in Appellate Court.* Whether proofs of loss were waived is a question of fact upon which the judgment of the Appellate Court is conclusive on further appeal to the Supreme Court.

3. **INSURANCE**—*when clause in a fire policy limiting time for bringing suit will not be strictly enforced.* An action on a fire policy is not barred though not begun until shortly after the time limited in the policy had expired, where a prior suit for the same loss was begun in time, set for trial and continued under a stipulation agreed to by the parties and approved by the court, but was afterwards, without authority, placed by the clerk on the docket of another judge, who, in ignorance of the facts, dismissed the case, when called, for want of an appearance.

4. **SAME**—*fire policy construed as covering all cars in possession of belt railway.* An insurance policy upon rolling stock owned or leased by a belt railroad company, and for which the insured is liable, covers all cars in its possession belonging to other companies for which the insured is responsible. (See *Home Ins. Co. v. Peoria and Pekin Union Ry. Co.* 178 Ill. 64.)

*Phenix Ins. Co. v. Belt Railway Co.* 82 Ill. App. 265, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This is an appeal from a judgment of the Appellate Court for the First District affirming the judgment of the superior court of Cook county, in an action brought by appellee, against appellant, on a policy of fire insurance.

Appellant issued its policy of insurance indemnifying appellee against loss or damage by fire, among other items, viz.: "\$52,750 on rolling stock as described below,

or leased, and for which the assured is liable, which is to be covered wherever it may be," etc., including box, coal and refrigerator as well as flat cars. The policy contained provisions requiring notice in writing by the assured to appellant of loss or damage by fire within six days, and within thirty days from the fire a particular and specific account of the loss, and a failure to give such notice and account within said thirty days rendered the policy void; also, that if the interest of the assured in the property be other than the exclusive ownership the company must be so notified and such interest be so expressed in the written part of the policy, or that should render the policy void; also, that no suit against appellant for the recovery of any claim by virtue of the policy should be sustainable until after an award, as provided by the policy, nor unless such suit should be commenced within twelve months after the date of the fire from which such loss shall occur; also, that any person other than the assured, who may have procured the insurance to be taken by appellant, shall be deemed the agent of the assured, and not of the company.

Five losses occurred during the life of the policy,—October 28, 1892; November 21, 1892; January 9, 1893; August 4 and August 24, 1893. The present suit was commenced on April 6, 1896. The declaration consisted of a special count, in which the policy is set out in full, and the common counts. To this declaration were filed; besides the general issue, three special pleas: First, failure to furnish proofs of loss; second, that the property destroyed was not the property of the assured; and third, that the action was barred by the twelve months' limitation clause in the policy. The last plea was No. 4.

In the second replication to the fourth plea plaintiff averred that within twelve months from the date of the several fires in said declaration set forth, plaintiff brought its action at law in this court against said defendant on October 13, 1893; that thereafter defendant

appeared in said action and filed pleas therein; that thereafter said cause was put at issue and stood for trial before a jury in this court; that on February 9, 1895, a stipulation was made between plaintiff and defendant, providing that a jury be waived and the case set for trial before Judge Payne, one of the judges of this court, and upon such stipulation an order was made by said judge setting said cause down for trial without a jury upon April 3, 1895; that upon stipulations the trial of said cause was set by order of Judge Payne for May 3, 1895, and continued until May 21, 1895, and finally on June 25, 1895, on motion of defendant and on account of the illness of defendant's attorney, an order was made by said Judge Payne continuing the trial of said cause until after vacation of said court; that thereafter the said cause was placed by the clerk of this court, by error and in disregard of said order of said judge, upon the calendar of Judge Sears for trial, and that on January 28, 1896, said cause was called on preliminary or first call of his calendar by Judge Sears, without notice to plaintiff and contrary to the stipulations and contrary to the order upon said stipulations setting said cause for trial before Judge Payne, and an order was made by said Judge Sears, on said preliminary or first call and before said cause was reached for trial, dismissing said cause at the costs of plaintiff for want of prosecution, contrary to said stipulation and contrary to said order of Judge Payne, and that said order of dismissal was made without plaintiff's knowledge or notice, and did not come to its knowledge or notice until after the expiration of the January term, 1896, of this court, at which time said order was made, and immediately thereafter plaintiff requested defendant and its counsel to consent to set aside the said order of dismissal, but defendant refused to do so, and within sixty days from the entry of said order plaintiff brought this action for the same causes of action for which said prior action was brought, and that by reason of the mat-



ter above stated and the stipulation so made, and the order so made by Judge Payne setting said cause for trial before him, said defendant is estopped from pleading in bar to this action that it was not brought within twelve months after the date of said losses. To this replication a general demurrer was filed, but it was overruled by the court. A rejoinder was then filed traversing the facts set up in the replication.

GEORGE S. STEERE, for appellant.

EDGAR A. BANCROFT, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It is first contended by appellant that the action is barred because it was not brought within one year after the fire, as required by the terms of the policy. The question whether the action was barred was raised by appellant's demurrer to appellee's second replication to appellant's fourth plea, but when the court overruled the demurrer the appellant did not stand by the demurrer, but filed a rejoinder traversing the facts set up in the replication. The rule is well settled in this State, that where a party to an action desires to have the ruling of the court in overruling a demurrer reviewed on appeal or writ of error he must abide by the demurrer. By pleading over the demurrer is waived. So, also, the right to assign error in the ruling. *Chicago and Alton Railroad Co. v. Clausen*, 173 Ill. 100, and cases cited.

But had the question been preserved we do not regard the ruling of the court in sustaining the replication erroneous. Evidence was introduced on the trial establishing the main facts set up in the replication, from which it appeared that the original action was brought within the time prescribed by the policy; that pleas were filed, upon which issue was taken; that by agreement of the parties a jury was waived and the cause was set for trial before Judge Payne; that after several postponements

by agreement of the parties, upon the application of the appellant, on June 25, 1895, an order was entered by Judge Payne continuing the trial of the cause until after vacation of the court, but, disregarding the solemn agreement of the parties and the previous order of the court, the clerk of the court placed the cause on the trial calendar of Judge Sears, and he, not knowing the agreement made by the parties and having no knowledge of the order of Judge Payne, when the cause was called on his calendar and no one appearing, entered an order dismissing the case from the docket. After parties have made a stipulation in regard to the trial of a cause, with the sanction and approval of the court, to allow a dismissal of the cause to bar an action would seem to be so unfair, unjust and inequitable that it should not receive the sanction of a court established to mete out justice to the parties. Whether the facts set out in the replication may be technically sufficient to constitute an estoppel *in pais* is immaterial. They do show a sufficient excuse for not complying strictly with the terms of the policy in bringing the action, and that is sufficient. *Home Ins. Co. of Texas v. Myer*, 93 IN. 271.

It is next insisted that proofs of loss were not furnished within thirty days after the fire, as required by the policy. Where proofs of loss are served on an insurance company and retained without objection, and the company refuses to pay the loss, denying all liability under the policy on grounds other than defects in the proofs of loss, any further performance of the condition in regard to proofs is waived. (*Continental Ins. Co. v. Ruckman*, 127 Ill. 364.) There were here five distinct losses. As to proof under losses 4 and 5 no question is made. As to the other losses, evidence was introduced tending to prove that proofs of loss were furnished within the time required, and also that the insurance company repudiated all liability within thirty days of each of the losses, and thus waived proofs of loss. Whether proofs

of loss were served on the company or were waived was a question of fact which the Appellate Court found against appellant, and the judgment of the Appellate Court is conclusive of the question.

It is also insisted in the argument that the policy does not cover the property destroyed. By the terms of the policy the insurance company insured the railroad company against loss or damage by fire on the following property: "\$52,750 on rolling stock as described below, or leased, and for which the assured are liable, which is to be covered wherever it may be, whether in any engine or car house or repair shop, or otherwise upon the line of the road hereby insured, or upon any branch railroad operated by the insured, as their interest may require." The cars destroyed were the property of other railroad companies, and were at the time of the loss being moved over appellee's line of road for other companies, to whom appellee was responsible for any loss that might happen to such foreign cars.

It is claimed in the argument that under the language of the policy the insurance company is only liable for cars owned by appellee or such cars as appellee may have leased. We do not think the language used will bear the construction contended for. On the other hand, we think it is plain that the proper construction to be placed on the language used is that the insurance company assumed responsibility for not only all cars owned or leased by appellee, but also all cars which might be in appellee's possession for which appellee was liable to other persons or companies. Indeed, appellee's main business was moving cars for other companies. It owned but few cars and leased but few, and the object of the insurance was to afford protection for loss which it might be required to pay other companies where cars belonging to such companies might be damaged or destroyed on appellee's line of road, and this fact was known to the insurance company when the policy was issued. A

policy in many respects similar to the one here involved was before this court in *Home Ins. Co. of New York v. Peoria and Pekin Union Railway Co.* 178 Ill. 64, where the insurance company was held liable.

Objection is also made to the ruling of the court on the admission and exclusion of evidence, but upon examination we find no substantial error in such ruling.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THE FOREST CITY INSURANCE COMPANY

v.

JAMES HARDESTY, Admr.

*Opinion filed October 19, 1899.*

182	89
86a	465
182	89
197	18
182	89
100a	250

1. **INSURANCE**—*equivocal expressions in a policy are interpreted most strongly against the company.* If a clause in an insurance policy is susceptible of two interpretations, that most favorable to the assured will be adopted in order to indemnify him for the loss sustained.

2. **SAME**—*in construing a policy the intention of the parties must be kept in view.* The assured is not bound by general words in the policy, although broad enough to include a particular contingency which afterwards happens, where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties.

3. **SAME**—*when change of title by death of the assured before loss does not work a forfeiture.* The death of the assured before the loss of the property by fire does not work a forfeiture of a fire insurance policy under a condition that it shall be void if any change takes place in the title or possession of the assured, where it is doubtful whether the words "change of title," as used in the policy, refer to a voluntary or involuntary act on the part of the assured.

4. **EXECUTORS AND ADMINISTRATORS**—*when administrator may recover for loss occurring after death of assured.* An administrator may maintain an action upon a fire insurance policy issued to his intestate, to recover for a loss occurring after the latter's death, where, subsequent to the clause which merely insures the intestate, there is a provision agreeing to make good to the assured, his administrators or assigns, such immediate loss or damage as shall happen by fire during the term of the policy.

*Hardesty v. Forest City Ins. Co.* 77 Ill. App. 413, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Hamilton county; the Hon. E. E. NEWLIN, Judge, presiding.

This is an action of assumpsit, brought on May 11, 1896, by James Hardesty, administrator of the estate of Henry Hardesty, deceased, on a fire insurance policy, dated January 21, 1892, issued to Henry Hardesty, insuring certain dwelling houses, household furniture, and grain hereafter described.

The declaration sets out the policy *in hæc verba*, and contains averments setting up the facts hereinafter stated. The appellant filed a general demurrer to the declaration, which was overruled by the trial court; and a rule to plead was entered. The appellant elected to stand by its demurrer, and refused to plead. Default was entered, and the cause was submitted to a jury, which returned a verdict in favor of the appellee for \$250.00. Judgment was entered upon the verdict against the appellant.

An appeal was taken to the Appellate Court. The Appellate Court has affirmed the judgment of the circuit court, and granted a certificate of importance.

The present appeal is prosecuted from the judgment of affirmance, so entered by the Appellate Court.

The following are the provisions of the policy, which are material in the decision of the questions involved, to-wit: "The Forest City Insurance Company of Rockford, Illinois, in consideration of premium refunded on policy No. 47,951, and a note for \$250.00 due January 1, 1892, does insure Henry Hardesty against loss or damage by fire, etc., \* \* \* to the amount of \$700.00 on the following property, to-wit:" (here follows the description of two dwelling houses, and the furniture in one of them, and of a frame barn and certain grain and hay in the buildings on the premises), "all situated (except as other-

wise herein provided) on, and confined to, premises owned and occupied by assured, to-wit: one hundred acres in section 12, etc., \* \* \* Hamilton county, Illinois."

"And the said company hereby agrees to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage not exceeding in amount the sum or sums insured, as above itemized, nor the interest of the assured in the property, as shall happen by fire, etc., \* \* \* to the property above specified from the twenty-first day of January, 1892, at noon, to the twenty-first day of January, 1897, at noon, except such portion of the above mentioned time as this company shall hold against the assured any past due and unpaid promissory note or order given as payment in whole or in part of the premium charged for this policy, during which portion of time this policy shall be null and void," etc.

"If the assured have, or shall hereafter obtain, any other insurance (whether valid or not) on the property hereby insured or any part thereof, without consent from the secretary of this company endorsed thereon, or if the above mentioned buildings, or any part thereof, shall be occupied or used, except as herein stated, or become vacant or unoccupied; or if the risk be increased by the erection of adjacent buildings, or by any other means whatever, without consent of the secretary of this company endorsed hereon; or if any encumbrance by mortgage or otherwise has been or shall be executed thereon, unless the same was fully stated in said application, or endorsed hereon by the secretary of the company; or if foreclosure proceedings shall be commenced; or if the assured fails to make known any fact material to the risk, or if any change takes place in the title, possession or interest of the assured in the above mentioned property; or if this policy shall be assigned without the consent of the secretary endorsed hereon, then in each and every such case, this policy shall be void."

Henry Hardesty, the assured, died intestate on April 16, 1894, leaving a widow, Nancy A. Hardesty. On April 24, 1894, James Hardesty, appellee, was appointed administrator of the estate of said Henry Hardesty. On November 28, 1895, the two dwelling houses covered by the policy were totally destroyed by fire.

WEBB & LANE, and CONKLING & GROUT, for appellant:

The policy says the company "does insure Henry Hardesty against loss." It is nowhere said that the company insures his heirs, executors, administrators or assigns. The contract was wholly personal with him. The loss, therefore, cannot be paid to any one other than Henry Hardesty. *Hine v. Woolworth*, 93 N. Y. 75.

The policy further says: "And the said company agrees to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage not exceeding in amount the sum or sums insured, \* \* \* nor the interest of the assured in the property, as shall happen by fire," etc. This clause is not a covenant of insurance, but a designation of the person to whom, in case of loss, the money shall be paid, namely, to the assured, Henry Hardesty; and if he shall have died after the policy became a claim, to-wit, when the fire took place, then the money, having become payable to him and he being dead, shall be paid to his executors or administrators, or, if the claim, after loss, had been assigned to him, then to his assignee. *Hine v. Woolworth*, 93 N. Y. 75.

The policy further provides that "if any change takes place in the title, possession or interest of the assured in the above mentioned property, or if this policy shall be assigned without the consent of the secretary endorsed thereon, then in each and every such case this policy shall be void." By the death of the insured he lost all title to, possession of or interest in the property. It is

true this change was not, by alienation, the act of the assured. It was doubtless a change brought about against his will; but death caused the change of title as fully as the owner's own act could have done. The policy was therefore void. 1 Biddle on Insurance, sec. 212, p. 207; *Miller v. Insurance Co.* 54 Ill.App. 53; Wood on Fire Insurance, (1st ed.) 319, and note; Ostrander on Fire Insurance, 239-241; 1 Arnold on Insurance, 146, and note; 1 Phillips on Insurance, 219; 2 Cuer on Insurance, sec. 24; 4 Wait's Actions and Defenses, 53; *Wyman v. Wyman*, 26 N. Y. 253; *Sherwood v. Insurance Co.* 73 id. 447; *Lappin v. Insurance Co.* 58 Barb. 325.

A. M. WILSON, and STELLE, WALKER & CROSS, for appellee:

The purpose of obtaining a policy of insurance is indemnity. *Insurance Co. v. Hoffman*, 31 Ill. App. 205; Phillips on Insurance, sec. 124.

A policy of insurance must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure. *Healey v. Accident Ass.* 133 Ill. 561.

As the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burden and duties imposed upon him. *Insurance Co. v. Robinson*, 64 Ill. 265; *Insurance Co. v. Scammon*, 100 id. 644; *Schroeder v. Insurance Co.* 109 id. 157; *Healey v. Accident Ass.* 133 id. 556; *Insurance Co. v. Froebel*, 31 Ill. App. 295; 1 Wood on Insurance, 140.

The words, "and the said company agrees to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage," etc., are in the policy and must be given some meaning. It will not do to say that those words can only refer to a loss



occurring before the assured's death, because the executors or administrators would have such right without the use of such words. The only effect that can properly be given to those words is, that in case of loss after the death of the assured the loss shall be paid (as stated in the policy) to his executor or administrator. *Richardson v. Insurance Co.* 89 Ky. 571; *Miller v. Insurance Co.* 54 Ill. App. 53; *Insurance Co. v. Kinnear*, 28 Gratt. 88; *Burbank v. Insurance Co.* 24 N. H. 550.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The policy of insurance in this case contains, among other conditions, the following condition: "If any change takes place in the title, possession, or interest of the assured in the above mentioned property, \* \* \* this policy shall be void." The insurance company agrees to make good the loss during a period of five years from January 21, 1892, to January 21, 1897. The assured, Henry Hardesty, died on April 16, 1894, and the fire, which destroyed the dwelling houses, occurred on November 28, 1895. The death of the assured and the loss both occurred within the five years. The loss of the property by fire occurred, however, after the death of the assured. Upon this statement of facts the appellant contends, that the death of the assured, thus occurring before the loss, worked such a change of title and possession in the property insured, as to make the policy of insurance void; and that, therefore, the appellant is not liable in this action.

The contention of the appellant assumes that the words, "change of title," as used in the policy, refer to and include the involuntary change of title caused by the death of the assured. The question, therefore, to be determined is whether, under the language of this policy and the facts of this case, the death of the assured caused such a change of title in the property insured, as to make the policy void.

Those portions of the clause, in which the condition, containing the words, "change of title," occurs, refer to voluntary acts on the part of the assured himself. The policy is to be void if the assured obtains other insurance without the consent of the company. The policy is to be void, if the buildings are used for other purposes than those mentioned therein, or are allowed to become vacant or unoccupied. The policy is to be void, if the risk is increased by the erection of adjacent buildings, or by any other means whatever. The policy is to be void, if any encumbrance is placed upon the property without the consent of the company, or if the policy is assigned without such consent, or if foreclosure proceedings are commenced, or if the assured fails to make known any facts material to the risk. All the acts specified in these various conditions are such acts, as may or may not be done or caused by the assured party or parties, or may or may not be omitted or refrained from by such party or parties. If the condition in question be construed with reference to and in connection with the other conditions, it would seem to follow that forfeiture was to be worked by some voluntary act of the assured.

The condition, which provides that, if any change takes place in the title of the assured, the policy shall be void, is a condition which provides for a forfeiture. In other words, the assured party is to submit to a forfeiture of his right of action, if any change takes place in the title. It is a well settled rule, that forfeitures are not favored either in equity or in law. Consequently, provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. (*Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558). It would seem to be unjust and inequitable, that a forfeiture should be enforced because of an act for which the assured is not responsible, and which is in no way his fault. It would be proper to hold the assured responsible for any act of forfeiture which is

within his control. There is no claim, here, that the death, which caused the change of title, was the result of suicide, or of any improper conduct on the part of the assured.

The change in title by death of the assured does not seem to have been contemplated by either party to the contract of insurance. Hence, although the words "change of title" may be broad enough to include the change worked by death, yet the assured will not be bound by such construction. In *Bailey v. DeCrispigny*, L. R. 4 Q. B. 185, it was said: "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Whether or not the words, "change of title," as used in this policy, refer to a voluntary act on the part of the assured, or to an involuntary act like death, is, to say the least, a matter of doubt, and involves a question of doubtful construction. Where the words in a contract of insurance are so framed as to leave room for construction, the courts are inclined to lean against that construction, which will impair the indemnity of the assured. If the clause in a policy is susceptible of two interpretations, that one will be adopted, which is most favorable to the assured, in order to indemnify him for the loss which he has sustained. (*Illinois Mutual Ins. Co. v. Hoffman*, 31 Ill. App. 295). In *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, we said: "Equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company." (*Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Schroeder v. Trade Ins. Co.* 109 id. 157). "The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in

putting a construction upon the policy." (1 Phillips on Insurance, sec. 124). Hence, the contract is always to be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity. (*Healey v. Mutual Accident Ass.* 133 Ill. 556). "It is a rule of law, as well as of ethics, that, when the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense, in which he had reason to suppose it was understood by the promisee." (*Hoffman v. Aetna Ins. Co.* 32 N. Y. 413). These rules of construction are applied to provisions and conditions in policies of insurance, because such policies are prepared by the companies themselves, and the language, in which they express their obligations and limit their liabilities, is selected by them, and not by the insured parties. (*Commercial Ins. Co. v. Robinson, supra*; *Webster v. Dwelling House Ins. Co. supra*).

It is said, however, by the appellant that the policy here in question insured Henry Hardesty only, and not his executors and administrators; and that, therefore, inasmuch as the loss occurred after his death, his administrator has no right to sue for a recovery of the amount of the loss. By the terms of the policy, the company agrees to "make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage \* \* \* as shall happen by fire \* \* \* from the twenty-first day of January, 1892, at noon, to the twenty-first day of January, 1897, at noon." Here certainly is an agreement to make the loss good, not only to the assured, but also to his "executors, administrators, and assigns;" and not only so, but to make it good for the whole period of five years, during which both the death and the loss occurred. It is true that the policy does not say, in so many words, that the company insures Henry Hardesty and his executors, administrators, and assigns, but the clause, which contains the agreement to make the loss good to the latter is so intimately connected

with the prior clause which insures Henry Hardesty, that the two clauses must be construed together. If the first clause is to stand entirely alone, then it fails to specify any time, during which the insurance is to run. The words, specifying the period of five years, are used in connection with the clause containing the words "executors, administrators, and assigns," but must also be held to apply to the earlier clause.

The construction insisted upon by the appellant is, that, in case the loss had happened before the death of Henry Hardesty, the right of action would survive to his executors and administrators, but that, the loss having occurred after his death, there was no right of action in his administrator. We are unable to concur in this view. The company agrees to make good the loss to the insured and his executors and administrators during a period of five years, irrespective of the question whether the loss should occur before or after the death of the assured. The plain meaning of the policy justifies the present action by the administrator. If the reference was only to the loss which should occur during the life of the assured, the use of the words "executors and administrators" would be unnecessary, as, in such case, the administrator would have a right of action under the law, and independently of any provision in the policy. The clauses of this policy are evidently framed so as to preserve the interests of the company, and yet not one of them refers to any such contingency as the death of the assured, except so far as may be inferred from the use of the words "executors and administrators." As the company agrees to make good the loss during five years to the executors and administrators, as well as to the assured, it must be held to be liable to such administrator as there might be during the period of five years. No administrator could be appointed during that period, unless the deceased had died during that time, and no loss could be made good during that time, unless such loss occurred during that time.

We are aware, that there is some conflict of authority on this question in the decisions of the courts; but we prefer to follow those authorities, which are in harmony with the view above expressed, that is, that the death of the insured under the language of the policy here does not work such change of title as to make the policy void.

In *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, the second condition in a policy of insurance was as follows: "And if the title of the property is transferred or changed, and the policy is assigned without written permission hereon, the policy shall be void;" and in construing that condition the court of appeals of Virginia said: "The third instruction refers to condition two. The court gave it with the construction, that the change interdicted by the condition was not intended to include devolution of title upon the heirs by the death of the assured. In this surely there was no error. By the change of title provided against in the condition, must have been intended a voluntary disposition or alienation of the property. It could not have been intended to embrace all kinds of transfer of title. \* \* \* It is to the last degree unreasonable to suppose, that any sane man would ever accept a policy of insurance against loss by fire, if he understood it, which contained a provision for immediate forfeiture by reason of his death and consequent descent of title to his heirs." (*Burbank v. Rockingham Mutual Fire Ins. Co.* 24 N. H. 550).

In *Richardson v. German Ins. Co. of Freeport*, 89 Ky. 571, the action was upon a policy of insurance against loss by fire, which was almost identical in its terms and provisions with the policy in this case. The assured died; and the principal question was, whether the policy became void by reason of the death of the assured, which occurred before the destruction of the property. In that case, the court of appeals of Kentucky held, that a forfeiting clause in a contract of insurance should never defeat a right previously agreed upon and provided for, unless the lan-

guage, strictly interpreted, requires it; that a policy of fire insurance does not become void on the death of the assured; that a provision in the policy, that it shall become void "if any change takes place in the title," does not apply to such a case as is shown by the undertaking of the company to make good the loss to the "assured, his executors, administrators, and assigns." In the opinion of the court in the Kentucky case it was said, that, by the language used, the property was insured for a specified period of time; and that the company "agreed in express terms to make good unto, not merely the insured himself, but as well his executors, administrators and assigns, the immediate loss or damage that might happen to the property at any time during that period, whether before or after his death; and, therefore, to treat that event as *ipso facto*, a termination of the policy and liability under it, would be contrary to the express terms of it, render the stipulation for payment to the personal representative of the insured superfluous, and allow the company to retain the full consideration paid, while being held to only part performance of its agreement." The court there further said, that the clause, "or any change takes place in the title, use, or occupation or possession thereof whatsoever," "does not necessarily or properly refer to a change unavoidably resulting from his death, but rather to such as might be caused or suffered by act of the assured while living." In that case also the court of appeals of Kentucky refused to follow the cases of *Sherwood v. Agricultural Ins. Co.* 73 N. Y. 447, and *Wyman v. Wyman*, 26 id. 253. Counsel for the appellant press upon our attention the reasoning of the Court of Appeals of New York in two cases decided in that State upon this subject. The doctrine of these New York cases has been referred to with approval in a number of text-books upon insurance, and our attention is also called to the language of these text-books. The principal New York cases thus referred to are *Sherwood v. Agricultural Ins. Co.*,

*supra*, and *Matter of Hine v. Woolworth*, 93 N. Y. 75. A reference to these two cases will show, that the conditions in the policies there, which provided for a forfeiture in case there should be a change of title, contained the words, "by operation of law." In the *Sherwood case* the condition was as follows: "If \* \* \* the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law; \* \* \* this policy shall be null and void." In the *Woolworth case*, the court says: "The policy contained a condition that, if the property insured should be sold or conveyed, or if the interest of the insured therein shall be changed in any manner, whether by act of the insured or by operation of law, the policy should be null and void," etc. The two New York cases, thus mainly relied upon, are distinguishable from the case at bar by the use of the words "by operation of law" in the policies, because those words necessarily refer to a change of title resulting from the operation of the Statute of Descents by reason of the death of the assured party. So far as the views of the New York cases go beyond the language of the policies, as thus indicated, and are opposed to the views expressed in the Virginia and Kentucky cases, we are not disposed to adopt them. So far as the case of *Wyman v. Wyman*, *supra*, is concerned, the condition there was against a transfer of the interest of the assured in the policy, and not against a change of interest in the property insured; and the decision of the court was based upon that distinction. (*Sherwood v. Agricultural Ins. Co. supra*). In reference to the case of *Lappin v. Charter Oak Fire and Marine Ins. Co.* 58 Barb. 325, it may be said, that the decision in that case was not rendered by a court of last resort, and is based largely upon the decision of the New York court of appeals in *Wyman v. Wyman*, *supra*, which the lower court felt itself bound to follow.



Our conclusion is, that the death of Henry Hardesty on April 16, 1894, more than a year before the fire occurred which destroyed the property insured, did not, under the facts of this case and under the provisions of the policy here sued upon, work such a change of title and possession in the property insured, as to make the policy void; and that the decisions of the lower courts are correct.

Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

# THE SECURITY TRUST COMPANY

v.

MARY TARPEY.

*Opinion filed October 19, 1899.*

1. INSURANCE—*when policy will not be forfeited for alleged false statements.* A life insurance policy issued by a company engaged in the insurance of sub-standard risks and upon a copy of the application which the insurer knew had been rejected by another company, is not forfeited because of a statement in the application, which was true when made, that applicant had not been previously rejected.

2. SAME—*fraud cannot be based on physician's opinion if the facts are truthfully stated.* A charge of fraud sufficient to avoid a life insurance policy cannot be based upon the examining physician's opinion, when accompanied by a correct statement of the facts upon which the opinion rested.

3. SAME—*forfeiture cannot be based on cause within agent's knowledge when issuing policy.* An insurance company cannot insist upon the forfeiture of a policy for a cause within the knowledge of its agent at the time the policy was issued.

*Tarpey v. Security Trust Co.* 80 Ill. App. 378, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding.

WHEELOCK & SHATTUCK, for appellant.

DOUTHART & BRENDENCKE, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellant, the Security Trust Company, filed its bill of complaint in the superior court of Cook county, praying for the cancellation of two policies of insurance on the life of William C. Cummings, one for \$3000 and the other for \$2000, payable to his sister, the appellee, Mary Tarpey. William C. Cummings answered the original bill and Mary Tarpey demurred to it, but Cummings died leaving Mary Tarpey sole defendant, and the bill was amended accordingly. The grounds upon which the amended bill asked to have the policies canceled were, that in the application therefor Cummings falsely and fraudulently answered that he had not made application for life insurance and been rejected, when in fact he had been rejected by the Iowa Life Insurance Company; that he stated his health was good, when he knew that it was not and that he had consumption; that he warranted these statements to be true while they were false and made with intent to deceive complainant, and that he obtained the policies by means of said false and fraudulent representations. By her answer to the amended bill defendant denied that Cummings made false representations, and alleged that complainant was organized for carrying on the business of insuring people who were in bad health and had been rejected by other companies; that for its policies complainant charged a premium far in excess of what other companies charged, and that it knew all the facts and circumstances concerning Cummings' health and his relation with other insurance companies. The defendant also filed her cross-bill, praying that an account should be taken of the amount due on the policies and that complainant in the original bill should be decreed to pay the same. The cross-bill was

answered, and replications being filed, the chancellor heard the cause and entered a decree dismissing the cross-bill and declaring the policies void. On a writ of error from the Appellate Court the decree was reversed, and the cause was remanded to the superior court with directions to dismiss the bill and to enter a decree in accordance with the prayer of the cross-bill.

The material facts proved are as follows: The complainant, the Security Trust Company, is a corporation organized under the laws of Pennsylvania and doing business in the State of Illinois. In October, 1895, Norman Kellogg was the general agent of complainant in Chicago, and advertised that the company would take sub-standard risks,—such as had been rejected by other insurance companies. On October 5, 1895, William C. Cummings, at the solicitation of Harry Bate, an agent of the Iowa Life Insurance Company, made application to that company for a policy of insurance of \$5000. On the following day Cummings was examined by the regular physician of said insurance company and signed a statement containing the following: "Have not now nor have ever had disease of lungs. I have had pneumonia. I have never made application to any life insurance organization which was denied." The report of that examination showed the number of respirations per minute to be twenty-two; that there was a prolonged expiratory murmur at the apex of the right lung, and the physician gave it as his opinion that, compared with the average of lives of the same age and sex, he considered the chances of life of Cummings to be bad, and that if he himself were in the business he would not insure the subject for life nor for a limited term of years. The agent, Bate, knowing that Cummings would be rejected by the Iowa Life Insurance Company on this examination, went to Kellogg, the general agent of complainant, in pursuance of the advertisement requesting insurance agents that might have rejected risks to turn them in to complain-

ant, and stated that he had a man who was going to be rejected. Kellogg explained to Bate and his partner, Louis Neuer, the objects and purposes of his company, and gave them a pamphlet issued by complainant, showing how to present applications and how to turn in rejected applications from other companies. The business of the company was stated to be insuring the classes of lives which are "sub-standard," including persons with physical imperfections, such as deformity, loss of a limb, eye-sight or hearing; occupations of an extra-hazardous nature; persons of overweight or underweight, or subject to attacks of acute disease, and those with unfavorable family histories, and those rejected by other companies. The premium was about thirteen per cent higher than that charged by companies which required good risks. The pamphlet stated that original applications made to other companies would be considered if not over ninety days old, or *verbatim* copies of original applications, duly certified by the rejecting company or a responsible general agent, might be used, but in all cases an original application must be signed by the applicant before the issue of the policy, and the physician originally making the examination must inspect the "risk" before the application was sent in, and make a satisfactory report. Kellogg told these agents that a copy of the application to the Iowa company would be all right. Kellogg gave the agents blanks of complainant, and on October 7, 1895, Bate made what he called a copy of the other application to be used with complainant, and the doctor made a copy of his report. These supposed copies were made on blanks which Kellogg gave them, but the blanks were different from the blanks of the Iowa company, and as filled up neither of them was a *verbatim* copy, but they were to the same effect. A few days afterward the agents went to Cummings and read to him from the pamphlet what risks complainant insured and about the use of the copies. They asked him to sign the copies made as

above, telling him that they were copies of the previous application, and he signed them as such, without reading them. Bate took these papers and delivered them to Kellogg, telling him they were copies of the application to the Iowa Life Insurance Company. Kellogg read them and sent them to the complainant's home office, in Philadelphia. The physician who had made the examination certified on October 11, 1895, that he had inspected Cummings and there had been no change in his physical condition since the date of said examination. The application, like the original of which it purported to be a copy, represented that Cummings had no disease of the lungs. The purported copies of the examination contained the following: "Are the respiratory organs (lungs, pleura, larynx, etc.,) free from any indication of disease?—No. Is the respiration full, easy and regular?—No. Number of respirations per minute?—22. Rate of pulse? (full minute)—85. Do you consider the risk first-class, fair or bad? If fair or bad, give reasons.—Fair; prolonged expiratory murmur at the apex of the right lung. Do you recommend the risk?—Yes." The policies were issued and sent to Kellogg, and he was then fully informed that Cummings had been rejected by the Iowa Life Insurance Company. With that knowledge Kellogg delivered the policies to Bate, who took them to Cummings and delivered them and collected the first quarterly premiums, giving the money to Kellogg. On October 31, 1895, complainant had Cummings examined by its medical examiner, and about that time tendered back the premiums paid and demanded back the policies. When the next premiums became due they were tendered and refused. Cummings' health remained apparently fair until the latter part of December, 1895, when quick consumption became manifest and ran a very rapid course until February 22, 1896, when he died.

The rules of complainant permitted the use of a copy of a rejected application made to any other company,

and its general agent, Kellogg, informed Bate and Neuer, and they informed Cummings, that such was the rule. Complainant was seeking rejected applications and advertising for them. Kellogg knew that the application had been made to the Iowa company, and the only probability of securing it for complainant depended upon its being rejected by the other company. It would be doing violence to the understanding of the parties to say that a copy of the rejected application might be used, and yet that the fact of its having been rejected would render its statement that there had been no previous rejection false and fraudulent. The statement in that respect was strictly true when made, and a copy of it was used at complainant's suggestion. Complainant sought a court of equity for the protection of its interests in the transaction, and such a court will give no heed to a claim that a copy of a truthful statement made to the Iowa company became a false statement made to deceive complainant.

The other statement alleged in the bill to have been false and fraudulent and to have constituted a warranty is, that he was in good health when he knew that he was not. He did not read the statement which was presented to him as a copy, but it is insisted by counsel that he was bound to do so and that he became responsible for whatever it contained. Assuming that to be so, we can not see that the conclusion on the question of fraud or warranty will be affected in any way. While the supposed copy was not exactly the same as the original application to the Iowa company, and what was called a supplementary application differs somewhat, they all amounted to substantially the same thing. In each he represented himself to be in good health. The report of the examination would indicate to a physician a probability of tuberculosis, but the doctor who made the examination testified that the indications might or might not point to such a disease; that there was a small area of consolidation of the lung,—not enough to cause any

inconvenience to Cummings; that it would not necessarily interfere in any way with him and that he might not know he was sick at all. If he concluded that Cummings probably had the disease he did not inform him, but advised him to consult a specialist, and if it was not tuberculosis it would make no difference, but if it was he should go to a different climate. There were eight witnesses, who were neighbors and intimate acquaintances of Cummings, who testified that he appeared to be in good health, and the evidence justifies the belief that he supposed himself to be in a fair state of health. He, of course, knew that he had been rejected by the Iowa company and that he was not a good risk for any company that required absolutely sound individuals, but it does not follow that he did not honestly consider himself eligible for insurance by complainant upon paying the higher premium demanded for insuring such risks as it took. Complainant insured those who had been rejected by other companies and charged an increased rate for taking increased risks. It was organized for the sole business of insuring extra-hazardous cases, for which it charged thirteen per cent higher premium than companies insuring sound and healthy persons. No sound person would insure in such a company and pay the higher premium, and complainant could not have expected any such thing. Although the germs of the disease were undoubtedly present, yet the disease had not become manifest to either Cummings or his most intimate associates, and the evidence does not show any intent to deceive the company. But however that may be, complainant knew as much, or more, about his condition than he did. It was fully informed of all the facts, and they were as well known to it when the policy was issued as they are to-day. It had before it the information in the medical examination that the lungs were not free from the indication of disease; that the respiration was not full, easy and regular; that the number of respirations per minute

was twenty-two; that the rate of pulse (full minute) was eighty-five, and that there was a prolonged expiratory murmur at the apex of the right lung. These facts are shown by the evidence to indicate to a physician the probability of the disease of which Cummings died. Complainant was fully cognizant of all these facts, and the general agent who delivered the policies knew that Cummings had been rejected by the Iowa company.

It is argued that the examining physician was not the agent of complainant and that he fraudulently concealed facts from the company. The charge of fraud is not true. He stated the facts fully and truthfully. The representation insisted upon as fraudulent and false consisted in this question and answer in the examination: "Do you consider the risk first-class, fair or bad? If fair or bad, give reasons.—Fair; prolonged expiratory murmur at the apex of the right lung." This was but a mere statement of opinion, accompanied by a correct statement of the facts upon which the opinion was based. He did not give an opinion that the risk was first-class, but gave it as fair, and what would be a bad risk for another company might justly be considered a fair risk for complainant, because it only proposed to take risks which were bad for other companies. There was no deception, and a charge of fraud cannot be based on such a statement of opinion.

It has been the rule of this court that an insurance company cannot insist upon the forfeiture of a policy for a cause which was within the knowledge of its agent at the time the policy was issued, and under the facts of this case it would be inequitable to permit complainant to say that the policies were obtained by fraud and deception, or that there was a warranty contrary to facts which were fully known to it when the policies were issued and delivered.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*



JAMES B. MCCOY *et al.* v. ELLA E. FAHRNEY *et al.*  
and

JOHN E. MCCOY *et al.* v. JAMES B. MCCOY *et al.*

*Opinion filed October 25, 1899.*

1. CONSTRUCTION—*language of written instrument may be affected by attendant circumstances.* In interpreting a written instrument the language used may be enlarged or limited by the attendant circumstances and the objects the parties evidently had in view.

2. CONTRACTS—*it is presumed that parties to post-nuptial contract intend to provide for issue of the marriage.* The presumption is that the parties to a contract in the nature of a post-nuptial marriage settlement intend to provide for the issue of the marriage, and only clear language in the deed will overcome the presumption.

3. TRUSTS—*language of trust deed construed.* A trust deed in the nature of a post-nuptial settlement, executed to secure a permanent support and maintenance for the use of the grantor's wife and children, and which directs the trustee, upon the death of the wife, to convey lands held by him to "all the children" of the wife, contemplates only the children of the grantor, and does not include issue of the wife by a second marriage.

APPEAL from the Circuit Court of Ogle county; the Hon. JAMES S. BAUME, Judge, presiding.

This was a bill in chancery for partition. The circuit court ruled the complainants in the bill and in the bill of interpleader had no title or interest in the premises involved, and dismissed the original bill and the bill of interpleader. The complainants in the original bill and the bill of interpleader are the children of Elizabeth McCoy, deceased, by her second husband, James B. McCoy, Sr., and the children of deceased children of said Elizabeth McCoy by her said second husband. Said Elizabeth McCoy was formerly the wife of one Samuel Ankeney. Of this former marriage two children were born, namely, Nathaniel A. and Ann Amelia Ankeney. The position of the defendants in the original bill is, the title to the premises in question vested in said children of the first marriage, from whom the defendants (appellees

here) claim by conveyance and descent. The title to the land in suit was in one Nathaniel Swingley, as assignee or trustee of said Samuel Ankeney, the first husband. Whether the children of the second marriage took any interest or title in the premises depends upon the construction of the following instrument:

"This indenture, made January 21, 1834, between Samuel Ankeney, of Washington county, and State of Maryland, of one part, and Nathaniel Swingley, of same county and State, of the other part:

"Whereas, said Samuel Ankeney is indebted to sundry persons by judgment notes and otherwise, and whereas he is desirous of making arrangements to liquidate said debts and to secure a permanent support and maintenance for the use of his wife and children: Now, this indenture witnesseth, that in consideration of the premises and of the sum of five dollars \* \* \* said Samuel Ankeney hath bargained and sold, aliened, enfeoffed and confirmed, and by these presents doth grant \* \* \* unto said Nathaniel Swingley, his heirs and assigns, all the right, interest and estate, both at law and in equity, of him, the said Samuel Ankeney, of, in and to a tract or portion of land situated, lying and being in Washington county aforesaid, of which a certain David Ankeney died seized in fee, and which land was sold to said Samuel Ankeney by a certain Henry Firey on the 27th day of October, 1822, as trustee, by virtue of a decree passed by Washington county court, as a court of equity, on the 29th day of March, 1832, in a cause pending in said court in which Samuel Ankeney and Mary Ankeney were complainants and Henry Ankeney, Sarah Ankeney, Jacob Ankeney and David Ankeney were defendants, which by reference to the proceedings in said cause, which is numbered on the equity docket of said court 352, will more fully and at large appear. Said tract or parcel of land hereby bargained and sold contains two hundred and twenty acres, more or less.

"And the said Samuel Ankeney doth by these presents further grant, bargain and sell unto the said Nathaniel Swingley, his executors, administrators and assigns, the following personal property, to-wit: One negro man, one negro boy, one negro woman and her two children, both girls, three years old and two years old, and one negro girl, three horses, five mares, three mare colts, all the cattle, hogs, sheep, ploughs, harrows and farming utensils, all the household and kitchen furniture, and all the rest and residue of the personal property, goods and chattels, of what nature or kind soever, said Samuel Ankeney now owns and possesses; to have and to hold the said lands and tenements, and the appurtenances thereunto belonging or in anywise appertaining, and also the above mentioned negroes, cattle or other goods and chattels, unto said Nathaniel Swingley, his heirs, executors and administrators, to and for the uses, trust and purposes following, and to and for no other use, intent or purpose whatsoever, that is to say, in trust; that the said Nathaniel Swingley shall sell and dispose of, at public or private sale, for cash or on credit, as in the judgment of said Nathaniel Swingley may be most expedient, all the aforesaid lands and tenements and all the aforesaid negroes, cattle, goods and chattels, except such portion of said negroes, goods and chattels as the said Nathaniel Swingley may think proper to retain for the use of said Elizabeth Ankeney during her lifetime, and convey the said lands and tenements by good and sufficient deed or deeds, and deliver possession of said negroes, goods and chattels to the respective purchasers of said lands, negroes, goods and chattels, and the proceeds of the said sales to apply first to the payment of all judgments which at this time may be obtained against the said Samuel Ankeney; secondly, to pay and satisfy all just debts at this time due or owing to any person or persons by said Samuel Ankeney, and all costs; \* \* \* and lastly, (after fulfilling and satisfying the aforesaid

trust,) to apply the surplus of the proceeds of the sales of said lands, negroes and goods and chattels as follows, that is to say:

"The said Nathaniel Swingley shall, in his discretion, either invest said surplus proceeds in bank stock or other stock, or loan the same to such person or persons or body corporate or politic as he may think proper, or purchase lands with said surplus proceeds either in the State of Maryland or in any other State or territory of the United States, as he may think most advantageous to the parties concerned. And if the said Nathaniel Swingley shall purchase lands with said surplus proceeds, he and his heirs shall hold the same in trust as follows, that is to say: He shall pay over the annual proceeds of such lands to Elizabeth Ankeney, wife of said Samuel Ankeney, and for her sole and separate use and benefit for and during the time of her natural life, and after her decease the said Nathaniel Swingley, or his heirs, shall convey the said lands so purchased with the said surplus proceeds, to all the children of the said Elizabeth Ankeney or the heirs-at-law of such of said children as may die leaving heirs before the death of said Elizabeth, the heirs of said children to have conveyed to them such portion of said lands as their ancestors would be entitled to if living. And in the event of the said Elizabeth Ankeney dying without leaving any child or children living at the time of her decease, or any descendant or descendants of any child or children, then the said land shall be conveyed to or held and enjoyed by the next of kin of the said Elizabeth. And in case said Nathaniel Swingley shall invest the surplus proceeds of said sale of said lands, negroes, goods and chattels in stock of any kind, or loan the same to any person or persons or any body corporate or politic, then the said Nathaniel Swingley, his heirs or executors, shall pay over annually to the said Elizabeth Ankeney, for and during the term of her natural life and for her sole and separate use, the dividends or

interest which may annually arise on such investment or loans; and on the death of said Elizabeth leaving a child or children or descendant of a child or children, then the said Nathaniel Swingley, his heirs or executors, shall transfer and deliver to such child, children or descendants of such child or children, the stock or principal which may be loaned or invested in manner aforesaid; and in the event of no child or children or descendant of such child or children living at the death of said Elizabeth, then the said stock or money loaned or invested as aforesaid shall be transferred to or held and enjoyed by the next of kin of the said Elizabeth. It is further agreed that said Nathaniel Swingley is not to receive any compensation for the execution of this trust.

"In witness whereof the said Samuel Ankeney and Elizabeth Ankeney, his wife, have hereunto subscribed their names and affixed their seals, the day and year first hereinbefore written.

SAMUEL ANKENEY, [Seal.]  
ELIZABETH ANKENEY. [Seal.]"

JAMES W. ALLABEN, and REUBEN C. BASSETT, for appellants.

J. C. SEYSTER, WILLIAM MARSHALL, and CYRUS HEREN, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The end to be attained by the interpretation or construction of the instrument is to ascertain the intention with which it was executed. That intention is declared in the premises of the deed to be to arrange to liquidate the debts of the said Samuel Ankeney "and to secure a permanent support and maintenance for the use of his wife and children." One of the purposes of the premises of the deed is to set forth the recitals which may be necessary to an explanation of the deed and its operation and the reason for executing it. (Black's Law Dic.;

Anderson's Law Dic.; 5 Am. & Eng. Ency. of Law, 454.) Tested by this declaration of intention, the object of the grantor is unmistakable. His purpose was to devote the property affected by the deed, remaining after payment of his indebtedness, to the benefit of his wife and his children. Nor do we think this declared purpose is to be overcome by the subsequent requirement that upon the death of the said wife of the said grantor the trustee shall convey any lands held by him under the terms of the trust to "all the children of the said wife of the grantor." The true intent is to be gathered from the whole instrument, the separate parts being viewed in the light of the other parts. (*Stout v. Whitney*, 12 Ill. 218.) Inconsistencies are to be reconciled, if possible. A narrow and unreasonable construction, and which would work a result different from that manifestly intended, should not be adopted. (*Dunlap v. Chicago, Milwaukee and St. Paul Railway Co.* 151 Ill. 409.) "The language used may be enlarged or limited by the attendant circumstances and the objects had in view, and more regard is due to the real intention of the parties than to some particular word that may have been used in the expression of that intention." (*Chicago, Madison and Northern Railroad Co. v. National Elevator Co.* 153 Ill. 70.) "The experience of human affairs teaches courts that this intention is not to be sought merely in the apparent meaning of the language used, but this language may be enlarged or limited by reference to the circumstances surrounding the parties and the objects they evidently had in view." (*Robinson v. Stow*, 39 Ill. 568.) The same principle is announced in *Street v. Chicago Wharfing Co.* 157 Ill. 605. "Particular expressions will not control where the whole tenor or purpose of the instrument forbids a literal interpretation of the specific words." (*Uphdike v. Tompkins*, 100 Ill. 406.) "A rigid adherence to the letter often leads to erroneous results and misinterprets the meaning of the parties. Inconsistent clauses must be construed according to the subject matter and the

motive, and the intention of the parties, as gathered from the whole instrument, must prevail over the strictness of the letter." (Beach on Modern Law of Contracts, sec. 708.) "Where two clauses, apparently repugnant, may be reconciled by any reasonable construction, or by regarding one as the qualification of the other, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent provisions." (Beach, sec. 718.) A written contract should be read as a whole. All its provisions are to be considered, and the general design must not be frustrated by allowing too much force to single words or clauses." (Beach, sec. 711.)

The instrument under consideration is in the nature of a post-nuptial marriage contract or settlement. In marriage settlements it is the presumption the parties thereto intend to provide for the issue of the marriage, and clear language in the deed is necessary to overcome this presumption. (*Wallace v. Wallace*, 82 Ill. 530.) In *Johnson v. Webber*, 65 Conn. 501, a bequest to a grand-daughter, and in case such grand-daughter should die leaving a husband surviving such husband should take the bequest, was construed to apply only to the then husband of the grand-daughter, and not to a second husband, on the ground the manifest intent of the testator, gathered from the entire will, could not be overcome by the particular words employed.

In *Elliott v. Elliott*, 117 Ind. 380, a devise of real estate to one designated in the will as the wife of the testator, though he had a former living wife from whom he had not been divorced, "with power to dispose of the same as she (the wife named in the will) may think best for herself and my children," and a bequest of personal property to the wife, "to have and use as she may think best and proper for herself and my children, provided that in case my beloved wife, Mary Ann Elliott, should marry after my decease, then and in that case it is my will that two-thirds of all my property, both real and

personal, shall descend in equal portions to my children," were held to be a devise and bequest to the children of the testator born of the person named in the will as his wife, to the exclusion of other children born to the testator by his lawful wife. The ground of the decision was, that though, ordinarily, when a man speaks of his children he is understood to mean his legitimate children, it was plain from the context of the will, taken as a whole, and the situation and circumstances of the family and property of the testator, he did not mean by the words "his children" to refer to his children born of his lawful wife. The intent of the testator was enforced in *Gelston v. Shields*, 78 N. Y. 205, though against the literal language of the will, the words "my children" being held to refer to children by the person named in his will as his wife, and not to include children born of a former wife. In *Thomas v. Crosby*, (Mass.) 51 N. E. Rep. 6, a trust deed executed by a husband and father was declared to be a family settlement, and the words "children" of the grantor were, in view of the manifest intent which animated the grantor, held to refer, not to all his children, but only to such as were born to him of his then living wife and to the exclusion of those born to the grantor by another wife.

Applying these rules of interpretation, we hold the trust deed under consideration was executed for the benefit of the then living children of said Samuel Ankeney born of his then wife and such other children as should thereafter be born to them, and that the provision of the deed that upon the death of his said wife all of her children should share in the property affected by the trust deed, meant all of her children born to him. The wife, subsequently to the execution of the deed, obtained a divorce from the grantor and became the wife of one James B. McCoy, Sr. Children born to the wife by the second husband, though included within the literal meaning of the words "all her children," were clearly not intended to



be included within the meaning of the word "all" as employed by the maker of the instrument. The word "all" must, in view of the manifest intention of the grantor, be so limited in meaning as to refer only to all of the class of children intended to be benefited by the instrument.

The chancellor correctly decreed the bill and the bill of interpleader should be dismissed, and that decree is affirmed.

*Decree affirmed.*

Mr. CHIEF JUSTICE CARTWRIGHT took no part in the decision of this case.

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HARLOW N. HIGINBOTHAM

v.

CHICAGO TITLE AND TRUST COMPANY, Assignee, et al.

*Opinion filed October 19, 1899.*

1. VOLUNTARY ASSIGNMENTS—*a creditor who files his claim within three months may object to discontinuance.* A creditor who has filed his claim with the assignee of his insolvent debtor within the three months limited therefor by the Voluntary Assignment act has an interest in a proposed discontinuance of the proceeding under section 15, and may object thereto.

2. SAME—*what creditors may assent to discontinuance.* Creditors who have the right, under section 15 of the Voluntary Assignment act, (Laws of 1879, p. 57,) to consent to a discontinuance of the assignment proceedings are those who have filed their claims within the three months specified in the act, and whose names and the amount of their claims have been reported by the assignee at the expiration of such time.

3. SAME—*county court cannot discontinue the proceedings before three months is up.* The county court is without power to enter an order, under section 15 of the Voluntary Assignment act, discontinuing the assignment proceedings before the expiration of the three months within which creditors are required by the act to file their claims, and any order so entered, being a nullity, may be set aside at a subsequent term.

*Higinbotham v. Chicago Title and Trust Co.* 77 Ill. App. 677, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the County Court of Lake county; the Hon. D. L. JONES, Judge, presiding.

On October 13, 1896, Isaac Goldberg filed in the county court of Lake county a deed of assignment, dated as of that day, and executed by him to the Chicago Title and Trust Company under the Voluntary Assignment Act. The deed of assignment was acknowledged by Goldberg on the day of its date, and, on the same day, was recorded in the recorder's office of said county; and, on the same day, the trust was accepted by the assignee therein named.

On December 1, 1896, there was filed in said county court a stipulation and consent, that the assignment proceedings might be discontinued, which stipulation and consent purported to be signed by a majority in number and amount of the creditors of said Goldberg. On the same day, namely, December 1, 1896, the county court entered an order, discontinuing the assignment proceedings, and directing that all parties be remitted to the same rights and duties existing at the date of the assignment, except so far as it had been administered; that the said assignee should re-convey to Isaac Goldberg all property acquired by it by virtue of said assignment, except so far as said estate had already been disposed of.

Afterwards, on November 6, 1897, Marshall Field, Harlow Higinbotham, and others, co-partners under the firm name of Marshall Field & Co., filed a petition in the county court, representing that they were creditors of Goldberg on October 13, 1896; that they filed their claim as creditors with the assignee before the expiration of the three months, allowed by law for filing claims; that their said claim is now, in part, in judgment, and that said judgment is unpaid; that on December 1, 1896, the assignee filed a petition, asking for a discontinuance of

the assignment proceedings, and presented a stipulation purporting to be signed by a majority, in number and amount, of the creditors of said Goldberg consenting to said discontinuance; that the petitioners did not, any or either of them, or any one for them, consent to said discontinuance, nor receive any notice of the application therefor.

The petition then sets up that the order of discontinuance was entered on December 1, 1896, and charges that said order was a nullity and absolutely void, and prays that the said order be set aside, and declared void and of no effect; and that the assignee be directed to proceed with the administration of the insolvent estate, and be ordered to file in court the claims filed with it against the said insolvent estate, and be ordered to report upon said claims.

On November 13, 1897, the assignee, the Chicago Title and Trust Company, and Isaac Goldberg, each entered their special appearance for the purpose of objecting to the jurisdiction of the court to entertain the said petition of Marshall Field and others, and asking that the said petition be dismissed for want of jurisdiction, upon the ground that the term, at which the order of discontinuance was entered, had passed.

On January 17, 1898, the county court dismissed the petition upon the ground that the term of court, at which the order of discontinuance was entered, had passed before the petition was filed; and that the court had thereby lost jurisdiction of the matter.

Harlow N. Higinbotham, one of the petitioners, took an appeal from the order of the county court, dismissing the petition, to the Appellate Court, and the Appellate Court affirmed the order of the county court. The present appeal is prosecuted from such judgment of affirmance.

CLARKE & CLARKE, for appellant.

SMOOT & EYER, and WHITNEY & UPTON, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The deed of assignment in this case was filed on October 13, 1896. The order, discontinuing the assignment proceedings, was entered December 1, 1896, forty-nine days after the assignment was filed.

The first question is, whether the county court, under the Voluntary Assignment act and the amendment thereto passed in 1879, has the power to enter an order discontinuing the assignment proceedings before the expiration of the three months, during which creditors are required by the act to file their claims.

This question was suggested, but not passed upon, in *American Exchange Bank v. Walker*, 164 Ill. 135, where we said (p. 139): "The statute gave him (the creditor) three months in which to file his claim. The estate of the insolvent had been taken into the custody of the law for the benefit of all creditors, who should file their claims within that time, and there was no priority or advantage to be gained by the first in point of time. The order of discontinuance was entered before the expiration of the time for filing claims. While appellee still had a right to file his claim and participate in the assets so held in trust for all such creditors, the transaction had been completed, the trust fund had been removed from the custody of the court, and the assignee discharged. \* \* \* Whether or not an order of discontinuance could be lawfully entered within the three months need not be considered. If it could, appellee as a creditor, with the right to file his claim, must be counted in calculating the number and amount of creditors assenting. As he must be counted in a discontinuance, he had an interest in it, and a right of objection to it, which he may protect against a fraudulent or unauthorized discontinuance." Here, the appellant, as one of the petitioning creditors, filed his claim within the three months allowed by law for filing

claims. He, therefore, had an interest in the discontinuance, and a right of objection to it.

Section 15 of the Assignment Act was an act passed on May 31, 1879, and was entitled "An act to amend an act entitled an act concerning voluntary assignments," etc. The said section 15 provides, that "all proceedings under the act, of which this is amendatory, may be discontinued upon the assent, in writing, of such debtor, and a majority of his creditors in number and amount; and in such case all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provision into effect." (2 Starr & Cur. Stat.—2d ed.—p. 2197). As section 15 was an amendment to the whole of the Assignment Act, it uses the words, "his creditors in number and amount," as such words were used in the provisions of the act, to which the amendment was made. Therefore, the "creditors in number and amount," a majority of whom have the power to assent to the discontinuance, are such creditors as are defined in the prior sections of the act.

Section 2 of the act provides, that the assignee shall forthwith give notice of the assignment by publication for six weeks, and send a notice thereof by mail to each creditor, "notifying the creditors to present their claims under oath or affirmation to him within three months therefrom." Section 4 of the act provides "that at the expiration of three months from the time of first publishing notice as before provided, the assignee or assignees shall report and file with the clerk of the county court, as aforesaid, a true and full list, under oath or affirmation, of all such creditors of the assignor or assignors, as shall have claimed to be such, with a true statement of their respective claims," etc. It is manifest, that the creditors, who are interested in the assignment proceed-

ings, and who, therefore, have a right to assent to the discontinuance thereof, are such creditors as have filed their claims within the three months specified in the statute, and whose number and amount have been reported by the assignee at the expiration of said period of three months. The statute provides the mode of ascertaining who are creditors, and what are the amounts of their claims respectively. Such mode is the giving of notice and the filing of claims with the assignee in pursuance of such notice, and the reporting of such claims by the assignee in the manner above specified.

It is conceded by counsel for appellees in the present case, and it also appears from the recitals in the order of discontinuance, that the court relied upon the testimony of the assignor and debtor, Isaac Goldberg, as to what and how many creditors he had, and as to what were the amounts of the claims of such creditors. Such mode of ascertaining the number and amount of the creditors is not prescribed by the statute. Long before the three months fixed by the statute for the filing of claims had passed, the court permitted the assignor to testify as to the number and amount of his creditors, and based its order of discontinuance upon such testimony alone. It is an unsafe practice to permit the debtor himself thus to establish the facts necessary to a discontinuance of the assignment proceedings against him. So far as we are able to ascertain from this record, it does not appear whether or not any of the creditors, signing the stipulation for a discontinuance and the assent thereto, filed their claims within the statutory period of three months.

The county court cannot judicially know, that the majority in number and amount of the creditors have consented to a discontinuance, until three months have passed, and the claims are brought into court by the report of the assignee. Hence, the court had no power to enter the order of discontinuance before the three months had elapsed.

In *Howe v. Warren*, 154 Ill. 227, referring to said section 15, we said: "By this section, the legislature has made the assignment, in effect, revocable by the assent of a majority, in number and amount, of the creditors who may have proved their claims in accordance with the provisions of the statute." Again, in *Levy v. Chicago Nat. Bank*, 158 Ill. 88, we said: "The case of *Howe v. Warren*, 154 Ill. 227, holds that, under section 15 of the Assignment Act, the assignment may be revoked by the assent of a majority in number and amount of the creditors, who may have proved their claims in accordance with the provisions of the act," etc.

If a majority in number and amount of the creditors, who are authorized to assent to the discontinuance, must be a majority of such creditors, as have proved their claims in accordance with the provisions of the act, then the order of discontinuance cannot be entered, until after the lapse of the three months, because, until then, it can not be certainly known who the creditors are, or who constitute a majority thereof in number and amount. In *Levy v. Chicago Nat. Bank*, *supra*, it was held, that the revocable interest of each creditor in the assigned estate only vests in him when he signifies his assent to the assignment by filing his claim with the assignee, and that it is the amount of his claim at that date, which should be taken as the basis of representation in paying dividends.

In *Union Nat. Bank v. Doane*, 140 Ill. 193, it was held, that the county court had no power whatever to make an order for the distribution of the insolvent estate before the expiration of the three months provided for in the act, and that an order, providing for the distribution of the assets of the insolvent before the expiration of the three months, was a nullity. We see no reason why the same principle, which applies to the distribution of assets in insolvent estates, or to the settlement of estates of deceased persons, should not also apply to the discontinuance provided for by said section 15.

The Assignment Act is a statutory proceeding, and the procedure there prescribed must be strictly pursued. We are, therefore, of the opinion, that the entry of the order of discontinuance on December 1, 1896, was premature, and that it was a nullity and absolutely void.

It is said, however, that, when the petition herein for the setting aside of the order of discontinuance was filed, the term, at which that order was entered, had passed, and that, therefore, the county court had no jurisdiction to set aside the order. Inasmuch as the order was a nullity, the proceedings stand as though no such order was made, and they are entirely within the control of the county court, even though the term, at which the order was entered, had passed. The order being a nullity, the court had power to direct the assignee to proceed with the administration of the insolvent estate the same as if no such order had been entered.

In *Union Nat. Bank v. Doane*, *supra*, where it was held that an order for the distribution of the estate before the expiration of the three months provided for in the act was a nullity, we had no difficulty in holding that the county court might set such order aside at a subsequent term. In the *Doane* case we said: "The order being a nullity, had the county court the right to change or modify it? \* \* \* The order being a nullity, the court might properly change or set it aside at any time before a final closing up of the insolvent estate was ordered."

Our conclusion is, that the court had power, at the time when the petition in this case was filed, to set aside the void order of discontinuance, which had theretofore been entered.

Accordingly, the judgment of the Appellate Court and the order of the county court are reversed, and the cause is remanded to the county court with instructions to proceed in accordance with the views herein expressed.

*Reversed and remanded.*



JOHN PENN, Trustee, *et al.*

v.

W. M. FOGLER *et al.**Opinion filed October 25, 1899.*

1. EXECUTORS AND ADMINISTRATORS—*administrator with will annexed does not succeed to executor's personal trusts.* An administrator with the will annexed succeeds to the duties and powers of the executor which result from the nature of his office as executor, but not to those in the nature of a personal trust or confidence.

2. SAME—*right of administrator with will annexed to ask aid of a court of equity.* It is the right of an administrator with the will annexed to apply to a court of equity for the appointment of a trustee to carry out the provisions of the will which do not strictly devolve upon him as such administrator.

3. SAME—*when decree does not warrant administrator's assumption of trust powers.* A decree which confers upon an administrator with the will annexed "all the powers, rights, duties and authority that an executor could or might have if named in said will," does not authorize him to exercise trust powers conferred upon the executor, but only such as appertain strictly to the office of executor.

4. SAME—*that administrator with will annexed is to report to county court excludes idea of his acting as trustee.* A requirement in a decree conferring authority upon an administrator with the will annexed that he shall report to the county court precludes the idea that he is to exercise trust powers reposed in the executor, since he would then have been required to report to the chancery court.

5. SAME—*administrator managing trust fund without authority is a trustee de son tort.* Management of trust property without authority by an administrator with the will annexed constitutes him a trustee *de son tort*, and renders him and his co-investors with notice equally liable for loss sustained.

6. TRUSTS—*principal should not be depleted to make up deficiency in allowance from income.* The principal of a trust fund cannot be resorted to for the purpose of making up the accruing deficiencies in a monthly or yearly allowance to be paid from income of fund.

7. SAME—*what an improper investment of trust fund by administrator with will annexed.* An administrator with the will annexed who holds national bank stock in trust is without authority, upon the surrender of the charter of the bank, to invest the trust fund in a banking partnership which continues the business.

8. SAME—*when trustee will not be protected against loss.* In the absence of specific directions by the settlor a trustee should invest trust funds in real estate or government securities, or, if acting

under the direction of the court, in such securities as it may approve, otherwise he will not be protected against loss.

9. *SAME*—*what will not authorize trustee to invest in private banking business.* A preference expressed in a will for the investment of a trust fund in national bank stock does not justify the trustee in continuing the investment in a private banking partnership which succeeded the national bank on the surrender of its charter.

10. *SAME*—*trustee is liable for loss on investment in absence of acquiescence by beneficiary.* A trustee who improperly invests the trust fund in a business enterprise is liable to the beneficiary for resulting loss, in the absence of acquiescence by the latter.

11. *PARTNERSHIP*—*partners knowing that co-partner has invested trust fund are liable to beneficiary.* Partners or stockholders in a banking partnership having notice that one of the partners has invested trust funds in the business are liable to the beneficiary.

12. *SAME*—*investment of trust fund—liability of incoming partners.* Incoming partners who have notice that a trust fund is invested in the partnership business are chargeable with liabilities occasioned by the violation of the trust after they became members.

13. *SAME*—*liability of selling partner for misuse of trust fund not terminated by sale.* Incoming partners who have notice that a trust fund is invested in the business are not chargeable with liabilities for violation of the trust before they became members, but the parties whose interests they bought, and who knew of such investment, remain liable to the extent of their interests so sold.

14. *LACHES*—*laches not imputed in action for fraud until fraud was disclosed.* Laches cannot be imputed to complainant in an action based on fraud until discovery of the fraud, or until it could have been discovered by the use of reasonable diligence.

15. *EVIDENCE*—*what competent on accounting against firm for misuse of trust fund.* Where the charging part of the bill makes a case for account against partners for mismanagement of a trust fund, evidence which discloses other facts in addition to those charged is admissible when it strengthens the right claimed and merely expands the measure of accounting.

16. *ESTOPPEL*—*remainder-man not estopped to complain of misuse of property before it falls into possession.* Estoppel against a remainder-man by acquiescence in a misuse of the property cannot arise until his interest falls into possession.

*Penn v. Fogler*, 77 Ill. App. 365, reversed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Fayette county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

This is a bill in chancery, filed September 1, 1896, by W. M. Fogler, and George W. Brown, the latter being administrator with the will annexed of the estate of Nathaniel M. McCurdy, deceased, and others, stockholders or partners in a certain banking firm, known as the Bank of Vandalia, against certain other stockholders or partners therein, and Imogene Marr, Harrietta Marr, McKendree College, and the Church Extension Society of the Methodist Episcopal Church, beneficiaries under the will of the said Nathaniel M. McCurdy, deceased, for the purpose of winding up the partnership affairs of said firm under the direction of the court, and for the appointment of a receiver of the firm assets, and for the distribution thereof after the payment of the firm liabilities, and for general relief.

The bill sets up the existence of the National Bank of Vandalia in Vandalia prior to April 2, 1883, and alleges, that it did a general banking business under the charter, issued to it under authority of the National Banking act, with a paid-up capital stock of \$100,000.00; that, on April 2, 1883, the stock was controlled and owned in certain proportions by certain persons, and, that among them, the Nathaniel M. McCurdy estate, of which George W. Brown was the administrator with the will annexed, owned \$40,000.00 of the stock; that the bonds deposited for the guaranty of the circulating currency were called in for redemption; that, the premiums on the bonds being at that time very high, the stockholders surrendered the charter, and continued the banking business as a co-partnership from April 2, 1883, to May 1, 1895, with the same persons and the same capital with certain exceptions therein set forth; that the partners were to share in the losses and profits in proportion to the amount invested by each respectively; that Lydia A. Fogler withdrew on June 8, 1887, her capital stock of \$15,000.00; that certain stockholders died in 1890, 1894, and 1895, leaving heirs and representatives, upon whose estates adminis-

trators and executors were qualified; that certain stock was sold, and the purchasers admitted as partners; that, on the dissolution of the firm, the interests of its members were two-fifths thereof, or \$40,000.00 in the McCurdy estate, and the other three-fifths in certain other persons, whose respective interests are named; that real estate was taken in settlement of bad debts; that the firm has notes and other evidences of indebtedness; that the assets should be reduced to money to pay creditors and to make distribution; that no settlement of the partnership affairs has ever been made; that the will provides for the payment of an annuity to Harrietta and Imogene Marr during their lives out of the earnings of the capital invested in the banking business; and that, at their death, such capital is to be divided between said college and said church extension society.

A decree was made, appointing a receiver and ordering him to take charge of the partnership assets.

One John Penn, trustee, who had been appointed trustee in a proceeding in chancery commenced by McKendree College and the board of church extension against George W. Brown and the annuitants as defendants, and to whom, as such trustee, George W. Brown was ordered to account for such fund and pay the same over, was made a party defendant to the original bill, and granted leave to answer and file a cross-bill. John Penn, trustee, in his answer, alleged that, when the partnership was formed on April 2, 1883, Brown was admitted as a general partner, and held the stock of the National Bank as an administrator of the estate, or the proceeds thereof, and contributed it to, and it was received by, said partnership as assets; that the persons, composing the firm at that time, knew that said fund did not belong to Brown, but was held by him as administrator, and was subject to the order of the county court of Fayette county. The answer further avers, that Brown had no authority to make such investment; denies the dissolution of the firm;

admits that the co-partners agreed to share the profits and losses, but denies that the legatees of McCurdy made any such agreement.

Penn filed a cross-bill, praying that the said sum of \$40,000.00, together with lawful interest thereon, be decreed to be a liability of said partnership, and a prior lien on the firm assets, and that, if the assets are insufficient to discharge the liabilities, a money decree be rendered against the defendants to the cross-bill for the residue; and prayed for general relief. The cross-bill makes parties defendant thereto all the parties to the original bill, except McCurdy's legatees.

The cross-bill avers, that Nathaniel M. McCurdy died, testate, September 29, 1876; that his will was admitted to probate; that, at the time of his death, he owned four hundred shares of the capital stock of the National Bank of Vandalia, which he bequeathed to McKendree College, and the Board of Church Extension of the Methodist Episcopal Church, subject to the payment of certain legacies and annuities out of the earnings of the stock; that, at his death, said shares of stock were worth no less than \$100.00 per share; that no trustee was appointed to execute said trust; that Mary K. Marr was to be paid an annuity from the earnings of the stock during her life, and, at her death, the same was to be paid to her two daughters, Harrietta and Imogene, in equal parts; and, at the death of either, the survivor was to receive the whole during life; that Mary K. Marr is dead, and her daughters still survive; that George W. Brown has been appointed, and is acting, as administrator with the will annexed; that the estate is still unsettled; that the stock came into Brown's hands as administrator, and, when received by him, was worth no less than \$40,000.00; that the charter of the bank was surrendered on April 2, 1883, and a partnership was formed by said stockholders and Brown to transact a banking business; that the said firm had a partnership fund called "capital stock;" that

Brown contributed the proceeds of said four hundred shares to the partnership; that the same was received by said partners, and each of them knew that no part thereof belonged to Brown, but was the property of McCurdy's legatees; that Brown was the cashier of said National Bank, and of the Bank of Vandalia, and continued as such, until the firm ceased doing business in May, 1895; that said firm has assets and liabilities; and that, among its liabilities, is the said sum of \$40,000.00, with lawful interest up to the filing of the cross-bill, which is due cross-complainant, as trustee.

Answers were filed by all the defendants to the cross-bill of John Penn, trustee, but the answer of George W. Brown thereto was separate from the others.

The joint and several answer of the defendants, except Brown, to the cross-bill sets up, that the National Bank of Vandalia ceased to do business, but that the same business was carried on with the same directors, and the same stockholders, at the same place and with the same assets, and with no change except in name; that the continuation of the business by the partnership was in accordance with the will. The answer denies, that Brown contributed to the firm \$40,000.00 belonging to the McCurdy estate, or that defendants had notice thereof, or that the partnership is indebted to the beneficiaries of McCurdy, or that the defendants agreed to pay the liabilities of the bank existing when they became interested therein except ordinary deposits, or that the cross-complainant is entitled to a prior lien on the assets, or to any relief whatever.

The answer further avers, that whatever use was made of said fund by either of the banks, or the firm, was well known to McKendree College, and to the board of church extension; that the latter consented thereto, and acquiesced therein. The answer also sets up *laches*, and the ten year, and five year Statute of Limitations as a defense.

George W. Brown, in his separate answer, avers, that, at the time of the surrender of its charter the National Bank had a large amount of real estate taken for bad debts, which had depreciated, and that, by reason thereof, the McCurdy stock was not worth \$40,000.00; that the charter was surrendered, because the bonds, securing the bank's circulation, were called in for redemption, and it would have been detrimental to buy other bonds on account of the high premium they commanded; that the total amount received on the sale of the bonds when the charter was surrendered was less than \$10,000.00; that the organization of said partnership and the continuation of the banking business were what prudent and careful business men would have done; that the college and the board of church extension consented to, and acquiesced in, and ratified the investment of the funds in the co-partnership.

An amendment was filed to the answer of W. M. Fogler to the cross-bill of John Penn, which sets up that, at the February term, 1877, of the circuit court of Fayette county, George W. Brown, administrator, etc., filed a bill for the construction of the will, and for the appointment of a trustee to sell the real estate and carry out the provisions concerning the bank stock; that the college and the church extension society were defendants thereto, and entered their appearances; and that a decree was entered therein on March 10, 1877, the substance of which is set out in the opinion.

Upon the hearing of the case, the court below made a final decree, sustaining the investment made by Brown in the partnership, known as the "Bank of Vandalia," and, in general, denying the relief prayed for in the cross-bill. By the terms of the final decree, it was ordered that the receiver proceed to execute the decree under which he was appointed; that, out of the assets in his hands, or to come into his hands, he should first pay the costs of the receivership, and next the creditors of the firm in

full; that, after such indebtedness is paid in full, he shall deliver to John Penn, trustee, two-fifths of the remaining assets, and to each of the remaining complainants in the bill, except Brown, their ratable proportion according to their respective interests; and that the receiver should pay all the costs of this proceeding. The complainants in the cross-bill of John Penn, trustee, excepted to the decree.

A writ of error was sued out from the Appellate Court to review the decree so entered by the circuit court; and the Appellate Court affirmed the decree of the circuit court. The present appeal is prosecuted from such judgment of affirmance entered by the Appellate Court.

The will of Nathaniel M. McCurdy, above referred to, is as follows:

"I, Nathaniel Masters McCurdy, of the city of Vandalia and county of Fayette, in the State of Illinois, being in good health and of sound and disposing mind and memory, calling to mind the uncertainty of life, and in view of a contemplated excursion through the Lake Superior, beset, as it must be, with dangers of both waters and land, and being desirous of so disposing of the little property with which a kind Providence has intrusted to my hands as to avoid litigation and waste, that it may be the source of the greatest good to others, I make and publish this my last will and testament, hereby revoking and making null and void all other wills and testaments by me heretofore made.

"And first, I desire and direct that my mortal body, wheresoever it may be that the immortal spirit departs therefrom, shall be transported to the vault prepared for the purpose near the McCurdy M. E. Church, in the city of Vandalia, in the State of Illinois, and placed by the side of the remains of my deceased wife, and that my epitaph be cut upon the same stone as that of my departed wife. And that there may be a legal as well as a moral obligation resting upon the trustees and society of the



McCurdy M. E. Church to respect the repository of the dust of myself and deceased wife, by keeping the tomb in decent repair and good condition, I give, devise and bequeath to the said trustees and their successors in office \$3000.00 in cash, to be continually invested so as to realize therefrom the highest legal interest, to be regularly paid semi-annually, and such interest invested in—first, the premium on insurance against loss by fire, and to be kept unremittingly effective on an amount not less than \$12,000.00, embracing the parsonage, as well as the church; secondly, the purchase and hanging a bell in the place where now hangs the bell I bought for that church sold to Michael Lynch, and which bell may now be sold to pay in part for the new bell under contemplation, which new bell shall weigh not less than twelve hundred pounds, and as much more as the trustees may think the church steeple is capable of sustaining; thirdly, the placing of a good and substantial iron fence in front of and on the two sides of the church lot, including the tomb or vault; fourthly, the roofing of the entire church and parsonage with slate as soon as the accruing interest will admit of the payment for these enumerated objects, and until then the interest is not to be expended for any other purpose whatever, but after these objects are procured and paid for, the balance of accruing interest forever shall be applied to the repairs of the church and parsonage, and the tomb, as occasion may require. If the lot on which stands the tomb should ever be sold, it can only be done in accordance with a provision of the discipline of the M. E. church, which requires the proceeds of such sale to be re-invested in another lot and church, and in such case I demand and require that my tomb shall be removed to the new lot and re-erected thereon, and preserved and taken care of as I expect and require to be done on the lot where it now stands; and as an evidence that the trustees of the church, for themselves and their successors in office, fully agree to perform the above re-

quirements, they accept the \$3000.00 with the conditions annexed. The \$3000.00 shall be paid by my executors hereinafter to be named as soon after my decease as they may be able to discharge all other bequests I make in this will, out of my dividends on my bank stock in the National Bank of Vandalia.

"Also I give and bequeath unto my sister, Mary K. Marr, now of Portland, State of Maine, \$3000.00 annually out of dividends to be made on the earnings of my shares of stock of the N. B. of V., or semi-annually, if so preferred by the bank, beginning as soon after my decease as may be convenient and continued as long as she may live, which cannot, in the common course of nature, be long, and after her death the same to be divided between her two daughters, Imogene Marr and Harrietta Marr, as long as they may both live. At the death of either let the same be paid to the survivor as long as said survivor shall live, at the death of whom it shall cease.

"The means to meet and discharge all the legacies in this will hitherto devised will be found in the earnings of my bank stock, and when they are all fully discharged I hereby will, bequeath and devise unto the proper government of McKendree College, for the use and behoof of said college, to endow and support and maintain and continue in use a professional chair, to be known as the 'McCurdy Professorship of the Pure and Applied Sciences,' two hundred shares, of \$100.00 each, to be transferred on the books of the National Bank of Vandalia to the credit of said McKendree College, the earnings of which shall be appropriated exclusively to the salary of the professor and the purchase of apparatus for use of such chair, in such proportions as the government of the college may agree upon. The said stock shall ever be considered as a perpetual endowment of said professorship and no part thereof shall ever be diverted to any other use, but it shall be kept upon the best interest obtainable, and the interest alone annually expended.

After the transfer of stock to the college or its authorized agent is made, and the college becomes the legal proprietor of that amount of capital stock, it, the college, will be entitled to a participancy in the management of the National Bank of Vandalia, and may continue so or sell out the stock and invest elsewhere, as they may determine for the benefit of the endowment, but as the condition of things now is I would advise that it be kept as stock in the bank so long as the bank may hold an existence as such, and then seek other investment.

"I also give, devise and bequeath to the Church Extension Society of the Methodist Episcopal Church, a body corporate under the laws of the State of Pennsylvania, (the corporate name of the society may at this writing be somewhat changed, but let it be understood that I mean the society once known by the above title,) two hundred shares of the capital stock of the National Bank of Vandalia, together with all the rights and privileges thereunto belonging or in any way appertaining; and as it is but a natural desire on the part of most men to have kept alive the name and remembrance of departed loved ones, and that it may induce others to follow my example, I make it a condition in receiving this legacy on the part of the church extension society that it shall ever be known, in both law and equity, as the 'McCurdy Fund for Church Extension.'

"I also will and ordain that my executors shall on the best terms they can make, and within a reasonable time after my death, sell all the property, real, personal and mixed, of which I may die seized and possessed or to which I may be entitled to at the time of my decease, and the avails of such sale, after all expenses and charges shall be fully met and all just demands against my assets are discharged and paid, and the money received kept on interest when the amount is too small to meet a legacy, shall be divided and paid over to the proper persons authorized to receive the same, as follows: To the

Fayette County Bible Society, of which I acted as secretary for twenty years, \$300.00; to the sisters Imogene and Harrietta Marr, both of Portland, Maine, \$3000.00 each if both shall be living at the time when the money may be ready for distribution, if one should be dead the survivor shall be entitled to receive the share of the other; and to Elizabeth Pingree, also of Portland, Maine, \$3000.00; and to Mrs. Eliza Watson, now of Cairo, in Illinois, \$1000.00; and to the four daughters of Samuel McCurdy, all of Augusta, State of Arkansas, \$1000.00 each if all shall be alive, if one or more be dead the whole to go to the survivors in equal proportions. And all the rest, residue and remainder of my estate and effects, whether personal, real or mixed, whatsoever and where-soever, not herein before otherwise effectually disposed of, I do give, devise and bequeath unto the missionary society of the Methodist Episcopal Church."

MERRILLS & MOONEYHAM, and G. A. KOERNER, for appellants:

The will specifically designates the property impressed with the trust, and expressly names the objects and purposes of the trust and the persons to be benefited thereby. It is therefore an express trust. Perry on Trusts, (3d ed.) sec. 24.

There is a distinction between a testamentary trustee and an executor. Where a testator appoints his executor as trustee, it is as if different persons had been appointed to each office. Perry on Trusts, (4th ed.) sec. 281; *Lindley v. O'Reilly*, 1 L. R. A. 79; *In re Estate of Higgins*, 28 id. 116.

Where a testator devised to his daughter one-half of his estate and directed his executors to put it on interest and pay her the proceeds, it was held that an administrator *de bonis non* with the will annexed did not succeed as trustee. *Shaw v. McCameron*, 11 S. & R. 252.

An administrator with the will annexed only has the powers of an executor *virtute officii*, and has no authority

over trusts created by the will. *Hall v. Irwin*, 2 Gilm. 176; *Nicoll v. Scott*, 99 Ill. 537; *Conklin v. Edgerton's Admrs.* 21 Wend. 423; *Mott v. Ackermann*, 92 N. Y. 349; *Knight v. Loomis*, 30 Me. 204; *Shaw v. McCameron*, 11 S. & R. 252.

The powers and duties not necessarily connected with the functions of an executor devolve upon the administrator with the will annexed only when it appears clearly from the will that the testator so intended. 1 Woerner on Administration, sec. 178; *Knight v. Loomis*, 30 Me. 204; *Conklin v. Edgerton's Admrs.* 21 Wend. 423; *Tainter v. Clark*, 13 Metc. 229; *Ingle v. Jones*, 9 Wall. 486.

Where the testator vests the office of executor and the office of testamentary trustee in the same person, it is the duty of the appointee to qualify in each capacity by taking credentials for each office, as executor from the probate court and as trustee from a court of equity. Schouler on Executors, sec. 485; *In re Estate of Higgins*, 28 L. R. A. 126; *Newcomb v. Williams*, 9 Metc. 525.

A person may become a trustee by intermeddling with and assuming the management of trust property without authority. Such persons are trustees *de son tort*. Perry on Trusts, (3d ed.) secs. 245, 265; *Piper v. Hoard*, 107 N. Y. 73; *Morris v. Joseph*, 1 W. Va. 256.

During the possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees. They cannot avoid liability by showing they were not in fact trustees, neither can they set up the Statute of Limitations. Perry on Trusts, (3d ed.) sec. 245; *Rackham v. Siddall*, 1 Mac. & G. 607.

When a liability arises from an intentional wrongful act of several parties conspiring together, each is liable for resultant damage. *Farwell v. Telegraph Co.* 161 Ill. 600.

If a partner uses trust money in the partnership business with the knowledge of the firm, the firm will be liable and must answer for the breach of trust committed by the co-partner. *Englar v. Offut*, 70 Md. 78; *Ex parte Apsley*, 3 Bro. C. C. 265; *Ex parte Watson*, 2 V. & B. 415;

Story on Partnership, sec. 368; Lindley on Partnership, (5th ed.) 161; *Smith v. Jameson*, 5 T. R. 599.

When a partnership is a party to a breach of trust it is liable to an accounting. (*Wilson v. Moore*, 1 M. & K. 127.) Especially so if the fund is used as firm assets. *Durant v. Rogers*, 87 Ill. 508; *Stokes v. Little*, 65 Ill. App. 255.

Members of a joint stock company are liable as partners. Where there have been changes in such a firm the new partners are liable for the debts. *Wadsworth v. Duncan*, 164 Ill. 360; *Wadsworth v. Laurie*, id. 42.

The equitable owner of a trust fund invested in such a partnership cannot be deemed a partner, where such investment was made without his knowledge and the affairs of the firm managed without his participation. *Wadsworth v. Duncan*, 164 Ill. 360.

Unless there is some express direction in the instrument creating the trust, trust funds must be invested in government or real estate securities. *King v. Talbot*, 40 N. Y. 76; *Simmons v. Oliver*, 74 Wis. 633; 2 Pomeroy's Eq. Jur. sec. 1074; *Gray v. Fox*, 1 N. J. Eq. 259; *White v. Sherman*, 168 Ill. 602.

Where the intention of the testator is that the *corpus* of the fund should be preserved in its integrity, and in that state go over to another after the death of the annuitant, it cannot be called upon to make up any deficiency of annuities. *Einbecker v. Einbecker*, 162 Ill. 267.

In order that the *cestui que trust* may be bound by acquiescence there must be on his part a full knowledge of all the facts and circumstances. A remainder-man cannot acquiesce until his interest falls into possession. (Perry on Trusts,—3d ed.—sec. 467.) And he must also be apprised of his or her legal rights in the premises. *Adair v. Brimmer*, 74 N. Y. 539.

Acquiescence of a party under ignorance of his rights will not operate as a waiver. The burden of proof of such ignorance is not upon the party against whom such acquiescence is alleged. *Bennett v. Colley*, 2 M. & K. 232.

Acquiescence will not be presumed from mere lapse of time if the *cestui que trust* has done nothing to acknowledge it or has received no benefit. (*Phillipson v. Gatty*, 7 Hare, 516.) Neither can it be inferred until the *cestui que trust* has actual knowledge of the breach, for the reason that it is the duty of the trustee to execute the trust and not the duty of the *cestui que trust* to make inquiries. *Thompson v. Finch*, 22 Beav. 325; *Perry on Trusts*, (3d ed.) sec. 850.

Constructive trustees or trustees *de son tort* cannot plead the Statute of Limitations. *Rackham v. Siddall*, 1 Mac. & G. 607; *Perry on Trusts*, (3d ed.) sec. 245.

PATTON, HAMILTON & PATTON, for appellees:

Brown, as administrator with the will annexed, had the power and authority, as such administrator, to manage and control the bank stock so as to produce the dividends with which to pay the annuities. 1 *Williams on Executors*, (7th Am. ed.) 563, 564; *Hall v. Cushing*, 9 Pick. 395; 1 *Woerner on Administration*, secs. 178, 245; *Buttrick Am. v. King*, 7 Metc. 20; *Knight v. Loomis*, 30 Me. 209; *Blake v. Dexter*, 12 Cush. 559; *Dorr v. Wainwright*, 13 Pick. 328; *DePeyster v. Clendening*, 8 Paige, 311; *Farwell v. Jacobs*, 4 Mass. 634.

In the management of personal property and trusts in relation to the payment of legacies from personal property or its earnings, all the duties of an executor which rest upon him by virtue of his office devolve upon the administrator with the will annexed, unless it appears from the will that such duties were cast upon the executor by reason of personal trust and confidence. 1 *Woerner on Administration*, sec. 178; *Leslie v. Moser*, 163 Ill. 502; *Hall v. Cushing*, 9 Pick. 395.

The doctrine that the duties cast upon the executor do not devolve upon the administrator with the will annexed has application only to a case where real estate is to be sold. This position is most clearly supported by

the cases of *Hall v. Irwin*, 2 Gilm. 176, and *Conklin v. Edgerton's Admrs.* 21 Wend. 431.

An administrator with the will annexed is authorized to apply to a court of equity to have a trustee appointed to make sale of lands, although perhaps not bound to do so. *Wenner v. Thornton*, 98 Ill. 156.

A partner is not liable because he is a member of a firm in which trust funds are improperly used, but because he knows of such breach of trust and consents to it. 1 Bates on Partnership, sec. 481.

To render a partner liable to restore or pay the value of the property, the use made of it by the executor must have been wrongful, and known by the other partners to have been wrongful. 1 Bates on Partnership, sec. 481.

The *cestui que trust* may elect whether he will ratify or disaffirm the use of the trust fund. He cannot do both at once. 2 Beach on Trustees, sec. 550; 27 Am. & Eng. Ency. of Law, 261.

One paying money to a trustee is not responsible for the misapplication of it. *Keane v. Roberts*, 4 Mad. Ch. 357; *Oglesby v. Foley*, 153 Ill. 19; *Bank v. Hyde Park*, 101 id. 595.

If the partners with Brown could be held to be trustees it could only be by operation of law, and they would be implied trustees. In that case the Statute of Limitations runs. *Kane v. Bloodgood*, 7 Johns. Ch. 90; 27 Am. & Eng. Ency. of Law, pp. 100, 101, and note 3 to p. 101; *McLafin v. Jones*, 155 Ill. 543; Buswell on Limitations, sec. 340; *Herr v. Payson*, 157 Ill. 244.

A new partner is not liable for former conversion of a trust fund to a partnership fund. 17 Am. & Eng. Ency. of Law, 1071, 1115, 1117; 27 id. 264; *Gunnell v. Cockerill*, 79 Ill. 79.

An incoming partner is not liable for debts of the old firm unless he expressly assumes them. *Mellor v. Lawyer*, 55 Ill. App. 679; *Wright v. Brosseau*, 73 Ill. 331; 16 Am. & Eng. Ency. of Law, 900, 905-907; 1 Lindley on Partnership, 206.



Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The will, in this case, appointed no executor or trustee. George W. Brown, who was then cashier of the National Bank of Vandalia, was appointed by the county court of Fayette county administrator with the will annexed of the estate of Nathaniel M. McCurdy, deceased, and filed his inventory, as such administrator, on January 8, 1877. The estate has not yet been settled by the county court. At the February term, 1877, of the circuit court of Fayette county, George W. Brown filed a bill, and, in the suit commenced by the filing of said bill, the decree of March 10, 1877, was entered. The bill itself and other papers in the case have been lost, and there is some dispute between the parties as to the contents of the bill, and as to the object sought by it. The appellees claim, that the object of the bill was to construe the will and determine the powers of Brown under it to conduct the business, including the bank stock. The appellants claim, that the bill merely asked for authority to sell real estate. Without deciding what was the real character of the bill, we will confine ourselves to the language and finding of the decree of March 10, 1877.

Counsel on both sides, discuss the question, whether the administrator *cum testamento annexo* had the power to execute and carry out the provisions of the will in regard to the four hundred shares of bank stock. Executors are often required by the terms of the will, appointing them, to act in a double capacity: *first*, as executors by virtue of their office; and, *second*, as agents or trustees under a warrant of attorney. An executor is often charged, not only with the duties and liabilities appertaining to that office, but also with certain duties in the execution of a trust, which is imposed upon him by the will. The general rule is, that the duties and powers of an executor, which result from the nature of his office as executor, devolve

upon the administrator with the will annexed. But the duties and powers, which are imposed upon an executor as a trustee, are in the nature of a personal trust or confidence reposed in him by the executor, and do not devolve upon the administrator with the will annexed, inasmuch as they cannot be delegated. (*Hall v. Irwin*, 2 Gilm. 176; *Nicoll v. Scott*, 99 Ill. 529).

It is clear, therefore, that George W. Brown, acting under his appointment as administrator with the will annexed as made by the county court, would have had no power to take upon himself the execution of the trust in regard to the bank stock. The question then arises, whether such power was conferred upon him by the decree of the circuit court of Fayette county, rendered on March 10, 1877, in the proceedings brought therein by the filing of the bill by Brown against the life annuitants, Mary A. Marr, Harrietta Marr, and Imogene Marr, and the remainder-men, or those entitled to take after the death of the annuitants, to-wit: McKendree College and the Church Extension Society of the Methodist Episcopal Church. Brown had the right, as administrator with the will annexed, to apply to a court, having equitable jurisdiction, to have a trustee appointed to carry out those provisions of the will, which did not strictly devolve upon him as such administrator. (*Wenner v. Thornton*, 98 Ill. 156).

The decree of March 10, 1877, did not give a definite construction of the will, so far as it related to the duties of the executor or trustee in relation to the bank stock. It will appear from the findings of the decree, as set forth in the reciting part thereof, that the object of the bill, upon which the decree was founded, was to get the permission of a court of chancery to sell the real and personal property of the estate. The decree finds, that the legatees in the will of Nathaniel M. McCurdy, deceased, were the Marrs, and the college, and the church extension society above named; that said McCurdy left a large amount of real and personal estate, which had

been inventoried, and reported to the county court by Brown, but that no executors were named in the will; and the finding portion of the decree then proceeds as follows: "And it further appearing, that said testator desired all of his real and personal property sold, conveyed, or transferred, to enable the specified legacies to be discharged, and of said personal estate there are four hundred shares of bank stock in the National Bank of Vandalia, valued at \$100.00 a share, and the following described real estate, to-wit: (here follows description of real estate)." The ordering part of the decree is that Brown, the administrator with the will annexed, "transfer and dispose of said bank stock as in said will specified, and that it be so transferred and disposed of for the uses and purposes in said will mentioned; and that said administrator is hereby fully authorized and empowered to sell all the other property of Nathaniel M. McCurdy, deceased, including real estate, personal and mixed property, and to collect what is due said estate, and to disburse the same as directed by said will; that said real, personal and mixed property may be sold, \* \* \* and said complainant (Brown) shall have generally all the powers, rights, duties, and authority that an executor could or might have, if named and mentioned in said will, and said administrator shall report all his actions and doings to the county court of said Fayette county, as provided by law in reference to administrators."

It is claimed by the appellees that, inasmuch as the decree gave Brown generally "all the powers, rights, duties, and authority that an executor could or might have, if named and mentioned in said will," Brown was thereby clothed with power to manage the bank stock in accordance with the terms of the will. But it was expressly held by this court in *Hall v. Irwin*, *supra*, that those words did not confer upon an administrator *cum testamento annexo* the right to exercise the trust powers conferred upon an executor, but only the powers appertaining strictly

to his office as executor. In *Hall v. Irwin*, *supra*, the case of *Conklin v. Edgerton's Admr.* 21 Wend. 430,—where words in a New York statute, precisely similar to the words used in this decree, were construed as being limited to duties belonging properly to the office of executor, and as not extending to anything to be done by the executor as trustee,—was approved by this court. Counsel for appellees insist, that the case of *Conklin v. Edgerton's Admr.* *supra*, has been since modified, if not overruled, by a subsequent decision made by the New York court of appeals. But we consider ourselves bound by the doctrine announced in *Hall v. Irwin*, *supra*, because the case of *Hall v. Irwin* was subsequently endorsed and approved by this court in *Nicoll v. Scott*, *supra*.

That the provision in the decree, which gave Brown the powers, rights, duties, and authority that an executor could or might have if one had been named in the will, did not confer upon him any other powers than those strictly appertaining to the nature of his office as executor, is apparent from the requirement, that he shall report all his actions and doings to the county court, as provided by the law in reference to administrators. Section 112 of the Illinois Administration act provides, that executors and administrators shall exhibit their accounts for settlement to the county court at the first term after the expiration of one year after the date of their appointment, and in like manner every twelve months thereafter. If the decree was intended to make Brown a trustee for the purpose of executing the trust in regard to the bank stock, and not a mere administrator to discharge the duties of administration, it would seem that he should have been required to report to the chancery court, which appointed him. The decree undoubtedly gave him power to sell the land with a view to paying the legacies to be paid out of the proceeds of the sale thereof, but the decree leaves it in doubt what duty was intended to be imposed upon him in relation to the bank stock. He was

merely required to "transfer and dispose of said bank stock as in said will specified," and "for the uses and purposes in said will mentioned." There is nothing in the language of the decree, that necessarily empowered him to hold the stock as administrator with the will annexed, until Mrs. Marr and both her daughters should die, and then transfer it to the college and the church extension society. Such a construction of the decree would give him the right to hold and manage the stock for a long period of years, or until the survivor of the three annuitants should die. The decree, on the contrary, seems to contemplate immediate action; and a fair construction of it would lead to the conclusion, that it was his duty to have either himself or another person appointed trustee by a court of chancery, and transfer the stock to such trustee.

If the decree did not confer upon Brown, administrator *cum testamento annexo*, the authority to execute the trust in regard to the bank stock, his acts in so doing constituted him a constructive trustee, or a trustee *de son tort*. Where one without authority undertakes to execute a trust, requiring the investment of a fund, he must himself carry all the risks, and make good all the losses, and have none of the profits, and his co-investors are equally liable. "A person may become a trustee by construction by intermeddling with and assuming the management of trust property without authority. Such persons are trustees *de son tort*." (Perry on Trusts,—3d ed.—sec. 245; *Morris v. Joseph*, 1 W. Va. 256; *Piper v. Hoard*, 107 N. Y. 73). "During the possession and management by such constructive trustees, they are subject to the same rules and remedies as other trustees; and they cannot avoid their liability by showing that they were not, in fact, trustees, nor can they set up the Statute of Limitations." (Perry on Trusts,—3d ed.—sec. 245).

*Second*.—But, for the purposes of this case, it may be conceded that Brown had authority, under the terms of

the decree, to manage the trust in regard to the bank stock. Did he do his duty as trustee, if he had the authority of a trustee in the management and investment of the trust fund in his hands?

The testator, Nathaniel M. McCurdy, owned four hundred shares of stock in the National Bank of Vandalia, each share being \$100.00, and the whole amounting to \$40,000.00. At the time of his death on September 29, 1876, this stock had a par value of \$100.00 per share, and was worth more than par. The shares were probably at the time at a premium. By the terms of his will he gave to his sister, Mary K. Marr, \$3000.00 annually out of the dividends to be made out of the earnings on these shares of stock, to be continued during her life, and after her death, the same to be divided between her two daughters, Imogene and Harrietta Marr, as long as they might both live; at the death of either, the same to be paid to the survivor as long as the latter should live. By the terms of the will, after the legacies charged against the bank stock should be paid, the testator bequeathed and devised to McKendree College two hundred shares of the stock, to be transferred on the books of the National Bank of Vandalia to the credit of said college; and two hundred shares of said stock to the Board of Extension of the Methodist Episcopal Church, a corporation organized under the laws of Pennsylvania.

When Brown was appointed administrator with the will annexed, he took possession of these four hundred shares of bank stock; represented it at the meeting of the directors and stockholders of the bank; collected the dividends thereon; paid the legacies to the Methodist Episcopal Church in Vandalia, and paid the annuities up to the time of the surrender of the bank's charter, as hereinafter stated.

The National Bank of Vandalia did business as such until the first day of April, 1883. At the latter date the National Bank surrendered its charter, pursuant to a reso-

lution adopted by its stockholders on January 11, 1883. That bank did no further business after April 3, 1883. The reason assigned for the surrender of its charter was, that the government bonds, pledged to secure its circulating currency or bills, had matured, and were called in for redemption; and that the premium on bonds, which could then be purchased to be substituted for those retired, was twenty-eight per cent. It is said that, in view of the high premium which it was necessary to pay in order to purchase new bonds, it was not for the interest of the stockholders to continue the existence of the bank as a national bank. Accordingly, on April 2, 1883, the stockholders of the National Bank organized a co-partnership under the firm name and style of the "Bank of Vandalia," and continued doing business at the same stand, formerly occupied by the National Bank of Vandalia. The new firm, by the agreement of the parties succeeding to the business of the National Bank, took possession of its assets, and assumed its liabilities. At the time of the surrender aforesaid, Brown, administrator with the will annexed of the estate of Nathaniel M. McCurdy, still had in his hands the four hundred shares of the capital stock of the National Bank of Vandalia. When the new firm was formed under the name of the Bank of Vandalia, he went into said firm as a partner in his capacity as administrator, and permitted the fund, consisting of said four hundred shares of bank stock, to go into the business of the new firm, and to be continued therein as a part of the assets of said firm.

The report of the National Bank of Vandalia, made by Brown to the comptroller of the currency on December 30, 1882, showed the total resources of the bank to be \$330,673.96, and the total liabilities to be \$190,928.27, leaving the net resources \$139,545.69. It is contended by the appellees that, of these resources, about \$69,000.00 afterwards proved to be a loss. But the evidence shows that, if such a loss occurred, it could have been avoided

in large part by proper management. The directors and stockholders, who were debtors to the firm, were settled with in such a negligent way as to involve a loss to the firm, and one or more of the stockholders was allowed to withdraw his or her capital to the detriment of the firm.

Whether the reason assigned for surrendering the charter of the National Bank was a good one or not, it was done by a vote of the necessary number of stockholders; and the question arises whether Brown made a proper investment of the funds of the estate, theretofore consisting of the four hundred shares of bank stock, when the surrender took place. The new firm, which was organized under the name of the Bank of Vandalia, was a mere partnership. It was none the less a partnership, because articles of association were entered into. The evidence is clear that Brown invested the trust fund in his hands in the new venture or partnership. The Bank of Vandalia was not subject to the restrictions, which were imposed by act of Congress upon the National Bank of Vandalia. Brown made the investment of the trust fund in the new firm upon his own judgment, and without applying for permission to do so, either to the county court, or to the circuit court. The fund in his hands belonged to McKendree College and the Board of Church Extension of the Methodist Episcopal Church, subject to the rights of Mrs. Marr and her two daughters to receive \$3000.00 a year from the income of the fund, so long as any one of them was alive. It was the duty of Brown, as administrator with the will annexed, to protect the principal, or *corpus*, of the fund for the college and board of extension, as only the income thereof was to go to the annuitants, Mrs. Marr and her two daughters. He, however, formed a new firm or organization, and paid out dividends, which trespassed upon and depleted the *corpus* of the fund. The law is that, where a monthly or yearly allowance is to be paid from the income of a fund, the *corpus* of the estate cannot be resorted to for the purpose



of making up the accruing deficiencies in the allowance. (*Einbecker v. Einbecker*, 162 Ill. 267). The new partnership not only continued the same banking business at the same stand, but substantially with the same capital and the same stockholders, as had been in and connected with the National Bank of Vandalia. The firm, known as the Bank of Vandalia, continued in business up to May 1, 1895, when it ceased to do business, and a new bank was organized and called the First National Bank of Vandalia. Brown was cashier of the National Bank of Vandalia from some time in 1866, soon after its organization, down to the surrender of its charter in April, 1883. He was also cashier of the partnership, known as the Bank of Vandalia, and also became cashier of the First National Bank of Vandalia. It does not appear, that any of the trust fund in question went into the latter bank, which was organized with a capital stock of \$50,000.00. The capital stock of the National Bank of Vandalia was \$100,000.00, and the same amount was invested in the new firm, known as the Bank of Vandalia. The interest of the McCurdy estate in the National Bank of Vandalia was \$40,000.00, or two-fifths of its capital stock, and it had the same interest in the capital invested in the new firm.

Brown was required by the decree of March 10, 1877, to report his actions and doings to the county court of Fayette county. He made three reports; the first one was filed March 8, 1879, and covered the period from November 30, 1876, to March 8, 1879. In this first report, he charges himself with a balance of \$50,471.50, and says, "included in the above balance is \$40,000.00 bank stock." In this report he also charges himself with dividends on the bank stock. In the report he charges himself with items of receipts, embracing personal property which includes the bank stock, and refers to this personal property as being embraced in the inventory filed by him in the county court. The inventory describes the bank stock

as follows: "Four hundred shares in the National Bank of Vandalia at \$100.00 per share, par value \$40,000.00." His second report is dated March 17, 1884, and embraces the period from March 8, 1879, to February 18, 1884. It will be observed, that a part of the time, embraced in the latter period, was after the surrender of the charter of the National Bank, which took place in April, 1883. In this report he says nothing about the surrender of the charter of the National Bank, and nothing about the formation of a new partnership, known as the Bank of Vandalia, nor anything about his investments of the trust funds in said partnership. On the contrary, he uses the following words: "Balance due, being bank stock held in trust, \$40,000.00." He also refers to the annuities paid Imogene and Harrietta Marr. At the time this report was made, there was really no bank stock existing in the National Bank of Vandalia, because that bank had gone out of existence in April, 1883. Whatever stock then existed was stock in the Bank of Vandalia, or rather a two-fifths interest in the partnership doing business under that name. The report, however, treats the bank stock, as though it was still existing in the National Bank of Vandalia. The report, taken in connection with the previous report, and the inventory referred to therein, can have no other interpretation than that of describing the four hundred shares of National Bank stock as still existing. There was nothing in the report to inform the county court that the stock in his hands was not National Bank stock. The report was calculated to deceive the court as to the character of the investment; and the author of the report must be held to have intended to make the impression, which the language of the report creates. The third report made by Brown was filed in March, 1896, and covers the period from February 18, 1884, to February 18, 1896, twelve years. In this third report he mentions, among the items of receipts, the following: "February 12, 1884, four hundred shares bank

stock par value, \$100.00 each, \$40,000.00." References are made to dividends on the bank stock, and to items paid out to Imogene and Harrietta Marr. The report asked the court to reduce the rate of interest to be paid to the annuitants from ten per cent per annum to four per cent per annum, and refers to his compensation, using the following words: "Until the conditions requiring the transfer of the bank stock to the final purpose intended by the deceased, viz.: to the McKendree College and the Extension Society of the Methodist Episcopal Church." This third report makes no mention of the formation of the new firm, and refers to a contemplated transfer of bank stock at some time in the future to McKendree College and the board of church extension. It is true that, in the last sentence of the report, the following words occur: "The four hundred shares of bank stock in the Bank of Vandalia at \$100.00 per share, total principal \$40,000.00 held in trust as administrator with the will annexed." No provision was made in the will for the transfer of any stock except national bank stock, and such transfer was to be made upon the books of the National Bank of Vandalia. When the third report was made, the National Bank of Vandalia had long since gone out of existence, and no transfer of stock could ever be made upon its books. No transfer of stock was directed by the will to be made upon the books of the Bank of Vandalia. It follows that the report was misleading, and although the words, "Bank of Vandalia," were used in the last sentence of the report, all the language taken together was calculated to make the impression upon the county court, that the administrator was dealing with the same stock, which was referred to in the will, and which had been mentioned in his former reports. The conclusion is inevitable, that this administrator with the will annexed not only failed to ask the advice of any court as to the investment of the trust funds in his hands in the new partnership venture, but that he sedulously

concealed from the court the fact that he had made such investment after it was made.

Under the law, Brown, as administrator with the will annexed, holding this bank stock in trust, had no power or authority to invest it or the proceeds of its sale, if it had been sold, in the new partnership. The evidence is clear that he did so invest it, and that he put it into the partnership, as trust funds in his hands as administrator with the will annexed. A trustee will not be protected from loss in investing trust funds, unless he invests in government or real estate securities, or other securities approved by the court, to which he is accountable. (*Simmons v. Oliver*, 74 Wis. 633). A trustee should not invest the money of others in his care in the stock or shares of any private corporation, nor has he any right to employ trust funds in a private business, and thereby subject them to the fluctuations of trade, even though such investment is approved of by his own judgment, and is made with honest intent. It is the duty of a trustee to make investments of trust funds in real estate securities or government securities, whether of the national or State government, or, if he is acting under the direction of a court, to select such securities as the court approves of. (11 Am. & Eng. Ency. of Law, pp. 819, 835; *Grey v. Fox*, 1 N. J. Eq. 259; *White v. Sherman*, 168 Ill. 589; *Mattock v. Moulton*, 84 Me. 545; *King v. Talbot*, 40 N. Y. 76; 2 Pomeroy's Eq. Jur. sec. 1074). In *King v. Talbot*, *supra*, the court said: "It is not denied that the employment of the fund as capital in trade would be a clear departure from the duty of trustees. If it cannot be so employed under the management of a co-partnership, I see no reason for saying that the incorporation of the partners tends in any degree to justify it."

It is claimed that, by making an investment of the trust fund in the partnership formed under the name of the Bank of Vandalia, it was continued as an investment in the banking business, and that the testator in his will

showed a preference for an investment in bank stock. The will, however, shows a preference on the part of the testator for an investment in the stock of a national bank, and not in the stock of a private bank. He says in his will: "I would advise, that it be kept as stock in the bank so long as the bank may hold an existence as such, and then seek other investment." This language refers to stock in a bank so long as it should exist as a national bank, subject to such examinations and other restrictions as are imposed by the National Banking law. There is nothing in the will to indicate, that the testator ever intended the investment to be changed from one in the national bank to one in the stock or shares of a private banking partnership. Changes in investments, or re-investments, should not be made by trustees as a general thing, unless they are ordered by a chancery court; and, in such case, the trust fund may be withdrawn and re-loaned. (11 Am. & Eng. Ency. of Law, p. 824). It is not claimed, that the Bank of Vandalia was organized under any private banking charter, granted by the legislature before the present constitution was adopted; and the present act, permitting the organization of corporations with banking powers, did not exist in April, 1883, when the firm, known as the Bank of Vandalia, was formed; that act was not adopted until 1887.

*Third*—The question arises as to the liability of those who were partners with Brown in the firm, known as the Bank of Vandalia. They are called stockholders, but it is apparent that they were mere partners. When the firm, known as the Bank of Vandalia, was dissolved on May 1, 1895, George W. Brown, as administrator with the will annexed of the McCurdy estate, owned an interest of two-fifths, or \$40,000.00 in the firm; and other parties, whose names appear in the record, owned the other interest of three-fifths in various amounts, ranging all the way from \$15,000.00 to \$500.00. From the time when the firm was organized up to the time of its dissolution, a few

changes in the stockholders took place, through death, and, in three instances, through transfers of stock.

Where a partner, who is a trustee or executor, improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debts, the *cestui que trust* will be entitled to re-imbursement by the firm, if the other partners have knowledge of the nature of the fund at the time of the misapplication. The other partners, at the election of the *cestui que trust*, are placed with the misappropriating partner in the attitude of trustees of the fund; and they are regarded as having connived at the violation of the trust. If they know that the fund belongs to an estate, they are bound to inquire upon what terms it is held. The liability, when incurred, is a joint and several one. (17 Am. & Eng. Ency. of Law, pp. 1071, 1072).

The rule is thus stated by Story in his work on Partnership (5th ed. sec. 368): "If one partner is separately entrusted with trust money, and he, with the knowledge and consent of his partners, applies it to partnership purposes, it will constitute a joint debt against the partnership at the election of the *cestui que trust* or beneficiary." (See also Parsons on Partnership,—4th ed.—sec. 104). Where all the partners know that the fund invested is trust money, they are implicated in the breach of trust. If they know that such money is being employed in the partnership business for the common benefit, they will all be bound for the money so employed, and be made answerable for the breach of trust committed by their co-partner with their acquiescence. (*Englar v. Offutt, Trustee*, 70 Md. 78). Bates in his work on the Law of Partnership, (vol. 1. secs. 481, 483,) thus lays down the rule: "If a partner has possession of the funds of others in trust \* \* \* and improperly uses the trust funds for the benefit of the firm, the nature of the co-partners' liability depends on whether they participated in the breach of trust. \* \* \* But if the other partners have knowledge of the nature of

the funds at the time of such misappropriation, they are implicated in the breach of trust, and become themselves, at the election of the *cestui que trust*, his debtors, or even trustees of the fund, as having connived at the violation." (1 Lindley on Partnership,—5th ed.—pp. 161, 162; *Jaques v. Marquand*, 6 Cow. 497; *Hutchinson v. Smith*, 7 Paige Ch. 26; *Guillon v. Peterson*, 89 Pa. St. 163; *Emerson v. Durand*, 54 Wis. 111; *Durant v. Rogers*, 87 Ill. 508; *Renfrow v. Pearce*, 68 id. 125).

The evidence is clear to the effect, that all the partners or stockholders in the partnership known as the Bank of Vandalia, had notice of the fact that Brown held the funds in his hands as administrator with the will annexed of the McCurdy estate; and that he invested the trust funds in the business of the new firm; therefore, these other partners are brought within the scope of the liability announced in the foregoing authorities. The other partners, in the accounting which is to take place when the case goes back, shall be charged with the value of the interest belonging to the estate of the deceased testator which had been represented by four hundred shares of National Bank stock before April 2, 1883, as such value existed when the new partnership was formed. When the new firm was formed in April, 1883, W. M. Fogler owned \$5000.00 of the stock, and Mary I. Henninger owned \$2000.00 of the stock. On January 14, 1892, Mary I. Henninger transferred \$500.00 of her stock to W. M. Farmer, and \$500.00 thereof to J. J. Brown, and on March 5, 1892, W. M. Fogler transferred \$4000.00 of his stock to Mary Wagner. The rule, announced in some of the text books, that, where the misuse of the trust funds has taken place before the admission of a partner into the firm, he will not be liable because not a participator in the mis-use, is invoked in behalf of these transferees. This rule is based upon the case of *Twynford v. Trail*, 7 Sim. 92. The examination, however, of the facts of that case will show that, at a certain date, two persons were admitted as

partners into a firm, and knew that certain trust money remained in the firm, but they afterwards retired, and other partners were admitted, and, upon the failure of the firm, these two persons were held not to be responsible for the breach of trust committed by their co-partners. No such state of facts exists in the case at bar. W. M. Farmer and J. J. Brown and Mrs. Wagner acquired their interests in the firm in 1892. The firm continued to do business thereafter for three years, and these transferees remained in the firm during that time. They did not retire from the firm to be succeeded by other partners, as was the case of the partners held not to be liable in *Twiford v. Trail*, *supra*. Farmer and J. J. Brown, as we understand the record, were lawyers, who had been consulted by G. W. Brown during his administration of the estate. Mrs. Wagner and J. J. Brown and Farmer knew that the funds, which George W. Brown had put into the firm, were trust funds. Those funds were used for the benefit of the firm during the three years following their entrance into it. It cannot be said of them that they were not participators in the mis-use of the trust funds. The liability of the firm to these beneficiaries, the McKendree College and the board of church extension, and the daughters of Mrs. Marr, existed when the new partners came into the firm, and continued to exist thereafter. The incoming partners should not be chargeable with liabilities for the violation of the trust which occurred before they became members of the firm, but the partners, who sold to them their interests, are to remain affected with such liabilities to the extent of their interests so sold.

*Fourth*—It is claimed by appellees, that the cross-bill does not contain such allegations as are sufficient to authorize an inquiry into the mismanagement of the trust fund by the partnership. We think that the bill is sufficient to authorize the granting of the relief asked for by it. It is a bill for account and relief. It traces the trust



fund into the hands of defendants, and avers that "the trust fund and interest thereon is a liability of the partnership." It charges that the defendants should, "in equity and good conscience be held to account to your orator for the said sum of \$40,000.00, so received by defendants as aforesaid." It is not necessary in a bill to charge all the circumstances, which may conduce to prove the general charge, for these circumstances are matters of evidence. This is especially true where the circumstances are of such a nature as to be peculiarly within the knowledge of the defendants, as was the case here. When the relief granted is not repugnant to the facts alleged and proved, it is properly granted, although not specifically prayed for under the prayer for general relief. (Story's Eq. Pl. sec. 28; *Stanley v. Valentine*, 79 Ill. 544; *Pope v. Leonard*, 115 Mass. 286; *Hopkins v. Snedaker*, 71 Ill. 449). Moreover, the defendants here did not challenge the sufficiency of the cross-bill by a demurrer, nor did they make any motion to make its allegations more specific. Nor did they raise the question of its sufficiency upon the admission of the evidence, and thereby furnish an opportunity for amending the bill. The proof, which is now claimed to be improper under the allegations of the bill, was allowed to go in without objection. Such proof discloses a case for relief, which is not inconsistent with the object and scope of the bill, and therefore may be given proper effect in entering the decree. Although the relief granted may be different from the relief specifically prayed, yet if it is consistent with the allegations and proof made, it is properly granted. (*McNab v. Heald*, 41 Ill. 326; *Morrison v. Smith*, 130 id. 304; *Hopkins v. Snedaker*, *supra*). As, in the case at bar, the statement and charging part of the bill make a case for account, it is not proper to refuse to consider evidence, which discloses other facts in addition to those charged, when the facts disclosed strengthen the right claimed, and merely expand the measure of accounting.

*Fifth*—It is further claimed that the beneficiaries, whose rights are here in controversy, to-wit: the daughters of Mrs. Marr, and McKendree College, and the board of church extension, are estopped from complaining of the conduct of these defendants by reason of alleged acquiescence and *laches* on their part. So far as McKendree College and the board of extension are concerned, their interests were not to accrue under the will until the death of the last survivor of the life annuitants. They are, therefore, mere remainder-men, and, under the law, a remainder-man cannot acquiesce until his interest falls into possession. (Perry on Trusts,—3d ed.—sec. 467; *White v. Sherman*, 168 Ill. 589).

So far as Imogene and Harrietta Marr are concerned, we have been pointed to no evidence, and have discovered none, which shows that they had any notice or knowledge of the improper investment made of these funds by the administrator with the will annexed. There is nothing in the record to show that any of the beneficiaries acquiesced in the wrong here complained of, and therefore, the principles announced in *White v. Sherman*, *supra*, upon this subject are precisely applicable here.

*Sixth*—Where a cause of action arises from a fraud, the bar created by *laches* will not apply in equity until the discovery of the fraud, or until the fraud could have been discovered by the exercise of reasonable diligence; the failure to use diligence is excused where there is a relation of trust and confidence, which renders it the duty of the party committing the fraud to disclose the truth to the other. (*Farwell v. Great Western Tel. Co.* 161 Ill. 522). There is nothing here to establish the fact, that any of these beneficiaries were guilty of *laches* after their discovery of the improper conduct of the trustee. *Laches* cannot be here pleaded against any equitable right of the college or against the board of extension, because they are not asking that they be put into possession of the fund, but that it be secured. The lapse of time is

no bar or evidence of *laches* against them, because as remainder-men they had not come into possession at the time of the wrongful investment and continuance of the same. (*Bennett v. Colley*, 5 Sim. 181).

Our conclusion is that John Penn, trustee, the complainant in the cross-bill below, and one of the appellants here, and the beneficiaries in the trust which he represents, are entitled to the relief prayed for in the cross-bill.

Accordingly, the judgment of the Appellate Court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court with instructions to proceed in accordance with the views herein expressed.

*Reversed and remanded.*

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ROBERT C. LAMBE *et al.*

*v.*

C. O. DRAYTON *et al.*

*Opinion filed October 25, 1899.*

1. WILLS—*devise construed as passing fee simple title.* A devise of real estate to a specified person, her "heir" and assigns, is equivalent to a gift to such person, her heirs and assigns, and amounts to a devise of the title in fee.

2. SAME—*fee simple devise cannot be reduced by habendum clause.* A fee simple title to land granted by a devise to the testator's wife, her heirs and assigns, is not limited and reduced to a life estate by a subsequent *habendum* clause "to have and to hold the said real estate to my said wife her lifetime."

3. SAME—*effect of section 13 of Conveyance act upon the construction of wills.* The right to look to qualifying words in wills or conveyances with a view to determining whether a less estate than a fee was intended to be passed, exists, under section 13 of the Conveyance act, (Rev. Stat. 1874, p. 275,) when words of inheritance are not used, but not if they are.

4. SAME—*remainder over after fee simple devise is void.* A remainder over attempted to be given to children after the fee simple title has been given to the widow by a preceding clause in the will is

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void because of the preceding fee, and void by way of executory devise because of the power of disposition given the first taker.

5. **REAL PROPERTY**—*power of alienation is incident to fee simple title.* The power to sell or otherwise dispose of land is involved in the grant of a fee simple title.

CARTWRIGHT, C. J., and WILKIN, J., dissenting.

WRIT OF ERROR to the Circuit Court of Clinton county;  
the Hon. A. S. WILDERMAN, Judge, presiding.

On the 16th day of January, 1890, Robert J. Drayton died testate. His will is as follows:

*"First*—I give and bequeath to my dear wife, Margaret Ann Drayton, her heir and assigns, all my real estate possessed by me at my death, together with all the hereditaments and appurtenances thereto belonging or in anywise appertaining, to have and to hold the said real estate to my said wife, Margaret Ann Drayton, her lifetime.

*"Second*—I give and bequeath to my wife, Margaret Ann Drayton, all my personal estate, goods and chattels, of what nature and kind soever.

*"Third*—At my wife's death I hereby direct my executors below named, to have my property, real and personal,—I mean what is left at my wife's death,—divided equally and share and share alike, between my three children or their legal heirs, James R. Drayton, Charles O. Drayton and Harriet B. Drayton, with this understanding: that any amount of money or other property received by any of my children, or paid by me for their benefit previous to my death, shall be deducted from their respective part of my estate."

Margaret Ann Drayton survived the testator and is still living.

The plaintiffs in error contended that James R. Drayton, mentioned in the third clause of the said will, under the proper construction of the will, became seized of an undivided one-third part of the real estate belonging to the testator, subject to the life estate of the widow, and that they had acquired such alleged interest of the said

James R. Drayton in said lands. They filed a bill in chancery for partition, and for other relief not necessary to be adverted to in the view taken of the case in the opinion. The circuit court construed the will to vest the title in fee simple absolute in the said Margaret Ann Drayton, and therefore dismissed the bill. This is a writ of error to bring the decree of the circuit court into review in this court.

M. P. MURRAY, for plaintiffs in error.

JOHN G. IRWIN, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In the first clause of the will the gift is to "Mary Ann Drayton, her heir and assigns." The word "heir" here has the same meaning as though it were "heirs." It matters not that the devise expresses "heir" in the singular, "while the statute heirs in the given instance are in the plural; for 'heir' is a collective term, and may stand for any number of persons who happen to fulfill the description." (Schouler on Wills, sec. 548). Therefore, by the first clause of the will, the language of the testator must be regarded as though it were as follows: "I bequeath to my dear wife, Mary Ann Drayton, her heirs and assigns, all my real estate," etc. The gift and bequest of the real estate to Mary Ann Drayton, her heirs and assigns, amounted to a devise of the title in fee. "The usual form of creating an estate in fee simple is by giving the property to the devisee, his heirs and assigns forever, but to him and his heirs is all that is technically required." (2 Redfield on Wills, p. 326; *Wolfer v. Hemmer*, 144 Ill. 554).

The question arises whether the devise to "Mary Ann Drayton, her heirs and assigns," is any the less a devise of the title in fee because of the use of the following words: "to have and to hold the said real estate to my

said wife, Mary Ann Drayton, her lifetime." It is contended by plaintiffs in error, and, at first blush, would appear to be the natural construction, that the use of the words last above quoted limited the estate of Mary Ann Drayton, as given by the will, to a mere life estate. It cannot be said, however, that the use of the qualifying words after the devise of the title in fee had the effect of thus reducing and limiting the character of the estate.

The words: "to have and to hold the said real estate to my said wife, Mary Ann Drayton, her lifetime," are the same words which constitute the ordinary "*habendum* and *tenendum*" clause in a deed. The object of such a clause in a deed is to state the character of the grantee's estate. But "so unimportant is the *habendum*, that, if it is hopelessly repugnant to the limitations appearing in the premises, it will be ineffectual to control the terms of the premises." (5 Am. & Eng. Ency. of Law, pp. 456, 457, and cases in notes).

Washburn, in his work on Real Property, (vol. 3,—5th ed.—marg. pp. 643, 644), says: "If, however, there is a clear repugnance between the nature of the estate granted and that limited in the *habendum*, the latter yields to the former. \* \* \* If, therefore, the grant be to A and his heirs, *habendum* to him for years or for lifetime, the restrictive clause is void, because it contradicts and defeats the grant." In *Tyler v. Moore*, 42 Pa. St. 376, Mr. Justice Strong, delivering the opinion of the court, says: "The purpose of the *habendum* is to define precisely the extent of the interest granted. It may lessen, enlarge, explain or qualify the interest described in the premises, but it must not be totally repugnant to it. \* \* \* Still it is true, that, if the *habendum* be absolutely repugnant to the premises, if it cannot be reconciled with them so that full effect can be given to both, it must give way, and the premises must stand. Thus, if there be a grant to one and his heirs, *habendum* to him for life, there is an irreconcilable contradiction, for it

cannot be an estate for life, and at the same time an estate in fee simple; either the word 'heirs' in the premises must be stricken out, or effect must be denied to the *habendum*." (*Flagg v. Eames*, 40 Vt. 23; *Nightingale v. Hidden*, 7 R. I. 118; *Walters v. Breden*, 70 Pa. St. 237).

If the rule of construction thus announced be applied to the language of the first clause in the will of Robert J. Drayton, it will appear that there is a clear repugnance or irreconcilable contradiction between the granting clause and the qualifying clause, or, in other words, between the premises and the *habendum*. When the real estate is given to Mrs. Drayton, her "heirs and assigns," and she thereby takes a fee simple title, it would be a violation of the above rule of construction to hold that the qualifying words in the clause limited and reduced her title to a mere life estate. Her estate could not be an estate in fee simple, and, at the same time, an estate for life. The two interests are contradictory of each other; and, therefore, the qualifying clause, which seeks to give her a mere life estate, must give way, and the clause, giving her a fee simple title, must stand. It follows that the first clause of the will must be construed as though the words: "to have and to hold the said real estate to my said wife, Mary Ann Drayton, her lifetime," were left out; and the whole of the first clause must be construed as giving to her a fee simple title in the real estate.

It is claimed, however, that the rule thus announced, to the effect that the *habendum* clause must give way when it is repugnant to the granting clause, applies only to deeds, and not to wills, which is undoubtedly true as a general rule. It is said that wills must be so construed as to effectuate the intention of the testator, and, that, by the first clause of the will, Robert J. Drayton's evident intention was to give his wife only a life estate. There is much force in this suggestion, but, under the doctrine laid down in *Wolfer v. Hemmer*, *supra*, it cannot prevail. Section 13 of the Illinois act in regard to conveyances

provides as follows: "Every estate in lands, which shall be granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law."

It will be observed that section 13, by the use of the word, "devised," was intended to apply to estates passing by wills, as well as to estates passing by deeds. That section was construed in *Wolfer v. Hemmer, supra*. It was there held, that the court can only inquire whether an estate less than the fee is limited by express words, or granted, conveyed, or devised by construction or operation of law, where words theretofore necessary to transfer an estate of inheritance are not used. Where an estate is devised to A without the use of the words, "heirs and assigns," A will take a fee simple estate of inheritance, unless the will or instrument of conveyance reduces the estate to an estate less than a fee by express words, or by construction or operation of law. But, as was held in *Wolfer v. Hemmer, supra*, where the essential words to pass an estate of inheritance, such as "his" or "her heirs and assigns," are used, the above section has no application. So, here, if the words of the first clause of the will of Robert J. Drayton had been: "I give and bequeath to my dear wife, Mary Ann Drayton, all my real estate," etc., she would, by those words standing alone, and unaccompanied by the words, "her heirs and assigns," have taken a fee simple title; but such title, where the words expressing a gift to her alone and not to her and her heirs, are followed by the words, "to have and to hold the said real estate to my said wife, Mary Ann Drayton, her lifetime," would be reduced to a less estate, to-wit, a life estate. But, inasmuch as words of inheritance are here used, a less estate is not limited by the qualifying words. In other words, the right to look to qualifying words in



wills or conveyances with a view of determining whether a less estate than a fee was intended to be passed, depends upon whether the grant or devise is to A alone, or to A, his heirs and assigns; in the former case, the estate may be limited by express words, or by construction, but, in the latter case, such limitation cannot be shown.

The rule, as above announced, furnishes a proper explanation of many of the cases, which seem otherwise to be in conflict. Thus, in *Ducker v. Burnham*, 146 Ill. 9, the devise was to the wife, Jennette Ducker, without the use of the words, "her heirs and assigns," and there the interest, upon a construction of all the language of the will, was held to be a mere life estate, and not an estate in fee, although the granting words to Jennette Ducker, considered by themselves and without being construed in connection with the balance of the will, would have given her a fee simple title.

It being settled then, that the interest, taken by Mary Ann Drayton by the first clause of Robert J. Drayton's will, was a fee simple title, the further question arises, whether the three children of the testator took any interest in the real estate under the third clause of the will. That clause provides as follows: "At my wife's death, I hereby direct my executors below named to have my property, real and personal—I mean what is left at my wife's death—divided equally, and share and share alike, between my three children," etc. It is clear that, inasmuch as the widow took a fee simple estate by the first clause, the estate over sought to be given to the children by the third clause, was void as being inconsistent with the gift in the first clause. The devise of an estate in fee carries with it the power of alienation; and "when the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes, an estate over is void, as being inconsistent with the first gift." (*Wolfer v. Hemmer*, *supra*). In 4 Kent's

Com. p. 270, the author says: "If, therefore, there be an absolute power of disposition given by the will to the first taker, \* \* \* the remainder over \* \* \* is void as a remainder because of the preceding fee; it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied by the will. A valid executory devise cannot subsist under an absolute power of disposition in the first taker." (*Wolfer v. Hemmer, supra*).

So, here, the remainder over to the children, attempted to be given by the third clause of the will, was void, because, by the first clause, the preceding fee had been given to the widow, Mrs. Drayton; and as the fee simple title, which had been given to her, included and involved the absolute power of disposition, the remainder in the third clause was void by way of executory devise. The limitation in the third clause is inconsistent with the power of disposition necessarily implied in the devise granted in the first clause. Of course, where the preceding gift or devise is not of the fee, but of the life estate, or of such a fee without the use of the word "heirs" as may be construed, by looking into the balance of the will, to be reduced to a life estate, the power of disposition may exist in the first taker, and a remainder may be limited after the termination of the life estate. (*In re Estate of Cashman*, 134 Ill. 88; *Kaufman v. Breckinridge*, 117 id. 305).

In other words, the power of disposition in the first taker depends upon the nature of his estate, whether it is expressly or by construction a life estate, or whether it is a fee simple title granted by words of inheritance, and involving expressly or impliedly the absolute power of disposition. In *Welsch v. Belleville Savings Bank*, 94 Ill. 191, the distinction here indicated is noticed and pointed out; we there said (p. 203): "We fully recognize the doctrine, that, where by the terms of the will there is given to one an unlimited power of selling or otherwise dispos-

ing of an estate in such manner as the devisee may think fit, a limitation over is inoperative and void by reason of its repugnance to the principal devise. \* \* \* But this doctrine has no application to a case where a life estate has been given to the first taker in express terms. Redfield, in his work on Wills, expressly lays it down, that 'a power of sale attached to a life estate will not have the effect to enlarge it into a fee.'" The same doctrine was announced in *Walker v. Pritchard*, 121 Ill. 221; *Ducker v. Burnham*, *supra*; *Henderson v. Blackburn*, 104 Ill. 227; *Hamlin v. United States Express Co.* 107 id. 443; *Skinner v. McDowell*, 169 id. 365.

It is true that the will of Robert J. Drayton did not expressly confer upon Mrs. Drayton, the first taker, the power of selling or otherwise disposing of the estate as she might see fit, but such power was involved in the fee simple title granted to her. If the estate granted to her had been a life estate, the power of disposition vested in her, so far as it was exercised before her death, would not have prevented the remainder in the property then undisposed of from passing to the children under the third clause of the will. Indeed, in such case, the interests of the children would have been vested remainders, subject to the life estate of the widow, and subject to her power of disposition, and would have so vested at the death of the testator. But no such remainders vested, or could vest in this case, by reason of the fact that the widow took under the first clause the fee simple title granted by words of inheritance, that is to say, granted or devised to her and her heirs.

For the reasons above stated, we are of the opinion that the circuit court correctly construed the will as vesting the title in fee simple in Mary Ann Drayton, and properly dismissed the bill. Accordingly, the decree of the circuit court is affirmed.

*Decree affirmed.*

CARTWRIGHT, C. J., and WILKIN, J., dissenting.

THE TOWNSHIP BOARD OF EDUCATION *et al.*

v.

JOHN CAROLAN *et al.**Opinion filed October 13, 1899.*

1. SCHOOLS—*township board cannot buy school site without authority of vote of electors.* A township board of education has no power to purchase a site for a high school without authority given by a vote of the township. (*Greenwood v. Gmelich*, 175 Ill. 526, followed.)

2. SAME—*what action by electors will ratify board's unauthorized purchase of site.* The unauthorized purchase by a township board of education of the site for a high school is ratified where the electors vote, at an election called for that purpose, to build a school house upon the site so purchased and to issue bonds for that purpose.

3. SAME—*members of board not entitled to special notice of a regular meeting.* That members of the board of education were not notified of the meeting at which an election was called to vote upon a proposition to build a school house and issue bonds in payment of it, does not invalidate the election, where the meeting was a stated one, provided for by a regular order.

4. SAME—*one polling place is all that statute requires for an election to build township high school.* But one polling place need be fixed in a high school district for an election to determine whether a new school building shall be constructed and bonds issued in payment.

5. SAME—*when notices of an election are not invalid.* The notices of an election to determine whether a high school building shall be erected and bonds issued therefor are not invalid because two of the members of the board sign as president and secretary, respectively, instead of as individual school directors.

MAGRUDER, J., dissenting.

*Carolan v. Township Board of Education*, 81 Ill. App. 359, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lake county; the Hon. CHARLES H. DONNELLY, Judge, presiding.

BOWEN W. SCHUMACHER, and MONK & ELLIOTT, for appellants.

D. H. PINNEY, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellees, John Carolan and many others, residents and tax-payers of high school township 43, in Lake county, filed their bill in equity in the circuit court of said county to enjoin the board of education of said township from issuing its bonds with which to pay for the erection of a high school building, in pursuance of a vote of the electors of said township. A temporary injunction was granted, but on the hearing the circuit court dissolved the injunction and dismissed the bill for want of equity. On appeal by the complainants to the Appellate Court the decree was reversed and the cause remanded, with directions to enter a decree making the injunction perpetual, as prayed in the bill.

The high school township was organized, in pursuance of a vote of the electors, in 1889, and a board of education was then elected, which board established a high school at Highland Park,—a city containing more than one-half of the population and situated on the shore of Lake Michigan and on the east side of the township,—which school has since been maintained in rented rooms, which have become inadequate and inappropriate for the purpose. The village of Fort Sheridan lies near Highland Park on the north, and the rest of the township consists mostly of farms and is less thickly settled. The township contains about thirty square miles of territory, and the inhabitants of its western part seem to have been opposed to the permanent establishment of the high school, at least at Highland Park. The high school township embraced two political townships,—the western, called West Deerfield, containing eighteen square miles and upwards of two hundred legal voters; the other called East Deerfield, which included Highland Park and Fort Sheridan, and containing upwards of six hundred legal voters. For general elections there were three polling places,—one in West Deerfield and two in East Deerfield. Two members of the board of education were

generally elected from West Deerfield and the other three from East Deerfield, and, for some reason, the two from West Deerfield rarely attended the meetings of the board. In 1896 the board purchased lot 8, in block 35, in Highland Park, for a site for a high school building, for the price of \$2750, and from taxes levied and collected for the purpose paid for it, and caused it to be conveyed to the trustees of schools of township 43 for the use of the township high school. This purchase was not authorized by any vote of the electors of the township. In July, 1897, at one of the regular meetings of the board, the three members only from East Deerfield being present, a resolution was adopted calling a special election, to be held August 21, 1897, for the electors to vote upon two propositions submitted, viz., for or against authorizing the board of education to erect a high school building upon said lot 8, and for or against issuing the bonds of the township, to the amount of \$30,000, with which to pay for said building. In pursuance of the resolution and notice the election was held at the time specified, from one o'clock to seven o'clock P. M., at the Young Men's Club building in Highland Park, and both propositions were carried by a vote of two hundred and forty for and thirty-five against.

The principal grounds on which it is claimed the injunction should be granted and the issuing of the bonds enjoined are: First, that the board of education had no power to purchase the site for the school house without a vote therefor by the electors of the township, and that therefore the subsequent calling and holding of the election to authorize the board to erect the building on the lot in question and to issue bonds to pay for it were illegal and void acts; and in this connection the position of appellants is controverted, that the vote to erect the building on said lot so purchased was a ratification of the purchase; second, it is contended that the election was not legally called, because the two members from

West Deerfield were not present and had no notice of the meeting; third, it is claimed the election was irregular and void because called and held at only one polling place remote from large numbers of the electors, and that the polls were not open for a sufficient length of time; fourth, that there were not a sufficient number of notices of the election posted; that they were not posted in public places, and did not remain, but disappeared a few days after they were posted, and that they were not properly signed.

As to the first point made, it was decided by this court in *Greenwood v. Gmelich*, 175 Ill. 526, that a township board of education has no power to purchase a site for a high school without authority given by a vote of the electors of the township; that their power in such a matter is the same as that of school directors to purchase a site for a district school, who are prohibited by the statute from making such a purchase without a vote of the people at an election called and conducted as required by the statute. Counsel for appellants have endeavored to distinguish that case from this, but we are unable to see any reason why the principle announced in that case is not equally applicable here. The question must be regarded as settled by the case cited.

A more serious question remains, and that is the alleged ratification, by vote of the people cast at the election held August 21, 1897, of the unauthorized purchase by the board of said school house site. The site had been purchased and paid for by the board from the taxes levied and collected for the purpose, and the title had vested, by the conveyance, in the proper authorities. If the people had the authority, as they certainly did have, to authorize the board to purchase the lot, they had the power to ratify the purchase made without authority, after such purchase was made. They were not bound to do so, and could have repudiated the purchase by voting down the proposition to build the house on that site. So, too, they

could ratify it, and we are of the opinion that they did so if the election in question was otherwise valid. It is to be remembered that one of the propositions voted on and carried was to build on this site, particularly describing the lot. It is difficult to see what more the people of the township could have done to ratify the purchase which had already been made with their money, than to vote for and adopt this proposition. There is nothing in the record to show that any other site was, or had been, proposed for submission, and the vote was not illegal or nugatory because confined to that site. It might well be that in many cases only one site would be proposed or desired by any one, and such may have been the case here, so far as the record discloses. Had the site not been previously purchased it would have been competent to submit the propositions to purchase it, to build a school house upon it and to issue the bonds, all at the same election. (*People v. Sisson*, 98 Ill. 335.) By the action taken, the effect in this case was substantially the same as if those propositions had been submitted to and adopted by the people at one election. (See *Leighton v. Ossipee School District*, 66 N. H. 548; 31 Atl. Rep. 899.) Municipal corporations may ratify the unauthorized contracts of their agents or officers within their corporate powers. *Town of Bruce v. Dickey*, 116 Ill. 527.

As to the second point, no notice to the members of the board of the meeting at which the election was called appears to have been necessary. It appears that the meeting was a regular and stated meeting of the board, previously provided for by a regular order.

*Third*—It is strenuously insisted that the election should have been held at the three polling places which had been provided for in the three precincts for the holding of general elections. Section 41 of article 3 of the School law provides: "For the purpose of building a school house, supporting the school and paying other necessary expenses the township shall be regarded as a



school district, and the township board of education shall have the power and discharge the duties of directors for such district in all respects." Section 31 provides that it shall not be lawful for the directors to purchase or locate a school house site without a vote of the people at an election called and conducted as required by section 4 of article 9 of the act. Section 8 of article 5 provides: "Notices of all elections in organized districts shall be given by the directors at least ten days previous to the day of said election. Said notices shall be posted in at least three of the most public places in the district, and shall specify the place where such election is to be held, the time of opening and closing of the polls and the question or questions to be voted on." And section 4 of article 9 provides: "Whenever it is desired to hold an election for the purpose of borrowing money, as provided for in this article of this act, the directors \* \* \* shall give at least ten days' notice of the holding of such election, by posting notices in at least three of the most public places in such district. Such notices shall specify the place where such election is to be held, the time of opening and closing the polls and the question or proposition to be voted upon," (prescribing a form of notice and indicating but one polling place). Other provisions of the statute requiring more than one polling place are not applicable to elections of this character.

We are satisfied that the high school township, for the purpose of the election in question, must be regarded as a school district, and that the statute required only one polling place, which was to be fixed by the board and stated in the notices which were required to be posted up in three of the most public places ten days before the election. The board followed the statute, and their action in doing so cannot be declared illegal. There is no evidence of any intent on their part to prevent publicity or to fix the polling place at a time or place to prevent a full vote from being cast. In fact, it appears that they

caused many unofficial notices to be posted up calling attention to the election and its importance. It also appears that all who appeared at the polls had ample time and opportunity to vote, and no one was deprived of the privilege of voting who desired to exercise it. It may be, and probably is, true that in such a district, greatly larger and more populous than an ordinary school district, provisions should be made for a more general and effective notice to the voters and for more than one polling place; but that is a matter of legislation. It seems that the election was held near the center of population and where it would be convenient to the greater number of the voters, and that the site selected was centrally located to accommodate the greatest number of pupils. The courts cannot relieve against the hardship, if any there be, to those whose homes are remote from such center, where the statute has been followed and no fraud has been shown, and where the election has been fairly called and conducted and the voters desiring to vote have not been deprived of the opportunity to vote.

The point is made that the notice should have been signed by the several members of the board according to the statutory form provided for signing by individual directors, instead of being signed by the corporation, by its president and secretary. We think the point unimportant. There was a substantial compliance with the statute in the respect mentioned, and the section of the statute referred to requires nothing more.

We cannot find, from the evidence, as it is contended we should, that the notices were not sufficiently posted, or not posted in public places.

The judgment of the Appellate Court is reversed and the decree of the circuit court is affirmed.

*Judgment reversed.*

MR. JUSTICE MAGRUDER, dissenting.

IDA M. GOGAN *et al.*

v.

WILLIAM P. BURDICK.

*Opinion filed October 19, 1899.*

1. DOWER—*what findings of fact will sustain a decree for dower.* Findings that the deceased died seized in fee of specified real estate, leaving surviving her the petitioner (her husband) and certain heirs, and that the premises set off to petitioner as his dower are one-third part of the property of the deceased, are sufficient to justify a decree vesting the property in petitioner for his dower.

2. SAME—*when allowance of damages for detention of dower cannot be sustained.* Damages for the detention of dower, allowed in a decree vesting specified property in the petitioner for his dower, cannot be sustained when the decree contains no recital authorizing the allowance and the evidence is not preserved in the record.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

ROGERS & MAHONEY, and FREDERICK A. WILLOUGHBY, for appellants.

JOHN A. MURPHEY, Jr., and S. LAING WILLIAMS, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, William P. Burdick, filed his petition in chancery in the superior court of Cook county, against the appellants, Ida M. Gogan, William H. Burdick and Burton E. Burdick, the only heirs-at-law of his deceased wife, Sarah M. Burdick, seeking to recover his dower in the lands whereof his said wife was seized of an estate of inheritance during coverture. The petition was answered, and the court decreed that the petitioner was entitled to dower and appointed commissioners to set off and allot the same to him. The commissioners reported that they had set off lot 94 in H. G. Spafford's subdivision of the north-east quarter of the north-east quarter

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of the south-east quarter of section 13, in township 39, north, range 13, east of the third principal meridian. The court approved of the report, and by its final decree vested said property in the petitioner as his dower in the property of his deceased wife described in the petition and decree, and ordered a writ of possession to put him in possession of said premises so set off to him. The court further decreed that the petitioner recover damages in the sum of \$360 for detention of his dower from October, 1897, to the entry of said decree, and that execution issue therefor.

The ground upon which a reversal is asked is that the decree is not supported either by findings of specific facts contained in it or by evidence preserved in the record establishing such facts. The settled rule is, that a party in whose favor a decree granting relief is rendered must sustain it by specific facts which justify it, either recited in the decree as proved on the hearing and found by the court or by preserving the evidence establishing such facts. (*Marvin v. Collins*, 98 Ill. 510.) In the decree in this case the court found the specific facts that Sarah M. Burdick died seized in fee of the real estate therein described; that she left surviving her the said petitioner, her husband, and the defendants, her only heirs-at-law, and that the premises allotted and set off to the petitioner as his dower are one-third part of the said property of the deceased. These facts are sufficient to justify the decree vesting the said property in the petitioner for his dower. If Sarah M. Burdick was seized in fee at the time of her death and petitioner was her husband and survived her, she was seized during the marriage of an estate of inheritance and he was entitled to dower. The decree, however, adjudges to the petitioner \$360 for damages, and it contains no recital which would authorize such a decree. There was a paper endorsed as a certificate of evidence and filed in the superior court, but that court found that it was never signed or sealed and was improv-

erly filed, and it was expunged and stricken from the record and files, so that there is neither recital in the decree nor evidence preserved showing the necessary facts to entitle petitioner to damages. The petition was filed August 25, 1896, and the allowance went back of the demand made by the commencement of the suit. Petitioner would be entitled to recover his damages from the time of his demand and a refusal to assign reasonable dower, but there is no finding or evidence of a demand, or the date of it, or what the damages, if any, were.

We are unable to sustain the decree for damages. In all other respects the decree is affirmed, but as to the allowance for damages it is reversed and the cause is remanded to the superior court, with leave to the petitioner to have a further hearing of his claim for damages if he shall be so advised. Appellants will pay two-thirds of the costs in this court and appellee one-third.

*Decree affirmed in part.*

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MAURICE WEILL

v.

THE AMERICAN METAL COMPANY.

*Opinion filed October 19, 1899.*

1. TRIAL—*right of court to direct verdict not taken away by conflict on immaterial matter.* A conflict in the evidence upon immaterial matter does not deprive the court of the right to take the case from the jury by an instruction.

2. SAME—*court need not submit issues to jury not based on the evidence.* Whether the contract sued upon had been abandoned should not be submitted to the jury in the absence of evidence of abandonment.

3. SALES—*what a sufficient tender of goods sold.* Merchandise sold is sufficiently tendered, to entitle the seller to maintain an action for breach of contract, where it was shipped to the city in which the purchaser resided but was not delivered because of his refusal to pay the draft attached to the bill of lading.

4. SAME—*sufficiency of tender of goods is waived by failure to object at the time.* Unless the sufficiency of the tender of goods purchased is

questioned at the time, the purchaser cannot thereafter be heard to object to it.

5. *SAME*—*refusal of purchaser to give shipping directions is a refusal of goods.* The refusal of a purchaser to give shipping directions for the goods is a refusal to accept them and relieves the seller from his obligation to forward them,—especially where the purchaser has an option as to the place of delivery.

*Weill v. American Metal Co.* 80 Ill. App. 406, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

PAM, DONNELLY & GLENNON, and M. J. ISAACS, for appellant.

HOYNE, O'CONNOR & HOYNE, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action of assumpsit, brought by the appellee, to recover damages for the failure of appellant to accept a certain quantity of lead and spelter which appellee had sold appellant. The contract was established by the letters and telegrams of the parties read in evidence on the trial, from which it appeared that appellee sold appellant eight cars of pig lead and eight cars of spelter, to be shipped to East St. Louis or Chicago, at appellant's option, the lead at \$3.65 per one hundred pounds f. o. b. Chicago or \$3.60 per one hundred pounds f. o. b. East St. Louis, and the spelter at \$4.20 per one hundred pounds f. o. b. Chicago or \$4.15 per one hundred pounds f. o. b. East St. Louis, two cars each of metal to be shipped in each of the months of March, April, May and June, 1893, and payment to be made by payment of sight draft, with bill of lading attached. In March and April, 1893, appellee shipped appellant two cars of pig lead and two cars of spelter, and in May, 1893, two cars of pig lead and one car of spelter, which were

paid for. On May 29, at appellant's request, it was agreed that the shipment of one of the two cars of spelter to be shipped in May should be postponed until July, and that the shipment of the two cars of spelter to be shipped in June should be postponed until August. In June appellee, by the direction of appellant, shipped to Chicago the two cars of lead to be shipped in that month, and on June 21 appellee drew a sight draft on appellant for \$2360.56, the amount of the shipment, and sent it, with the bill of lading, to Chicago for collection. The draft was presented but payment refused unless appellee would allow \$133.99, which appellant claimed grew out of transactions between the parties prior to the making of the present contract. Appellee denied the claim and refused to allow it. On July 17 appellee wrote appellant for shipping directions for the car-load of spelter to be shipped in July, but no shipping directions were given. On August 10 appellee wrote to appellant for shipping directions for the two cars of spelter to be shipped in August, saying: "You are undoubtedly aware that it is necessary for me to have sufficient time to effect shipment, and I hereby request you to let me have shipping instructions for these two car-loads on or before August 21. Unless I am on the 21st of August in possession of your shipping instructions for the said two cars of spelter I shall infer that you decline to take delivery of the said two car-loads." To this letter appellant made no reply. The action was brought to recover damages for appellant's failure to accept and pay for the lead and spelter, and on a trial before a jury appellee secured a verdict and judgment for \$1136, which was affirmed on appeal to the Appellate Court.

The circuit court instructed the jury to find the issues for the plaintiff, and the giving of this instruction is the first alleged error relied upon in appellant's argument. Where there is evidence before the jury fairly tending to prove or disprove any material issue involved in a case,

it is not within the province of the court to take the case from the jury by an instruction. Here, it is claimed that there was a conflict in the evidence in regard to an interview alleged to have occurred between Baerwald, one of plaintiff's witnesses, and appellant, on July 10, 1893, in regard to the tender of two cars of lead and a demand of payment. But conceding this to be true, appellant's position is not tenable. The testimony of Baerwald may be disregarded entirely and the evidence stands uncontradicted that the two cars of lead were shipped to Chicago by appellant's order; that the lead arrived; that appellee made a sight draft for the amount of the lead; that the draft, which was put in evidence, was sent for collection through a bank in New York, with the original bill of lading attached, and duly presented for payment and payment refused. Whether, therefore, Baerwald had the interview with appellant testified to by him was immaterial and a matter of no consequence.

It is also claimed that it should have been left to the jury to determine whether or not the contract between the parties had been terminated. The sole claim of appellant that the contract had been terminated is predicated on a letter written by appellee on June 23, which was as follows: "We have your letter of the 21st inst., in which you give us notice that you will not honor our draft for \$218.28 against two casks of Italian antimony sold to you on the strength of the order given us in your letter of June 16. The reasons given in your letter for acting thus are very unbusinesslike. If there should ever be a difference to which you are justly entitled, you are very well aware that we are not the people to refuse a settlement. \* \* \* We now beg to give you notice that unless these two invoices are promptly settled by you we shall consider all business between us at an end for once and forever. This is not the way in which reputable firms do business." This letter does not allude to the contract existing between the parties in reference to



the lead and spelter. It is written in regard to another matter, and we see nothing in the letter that tends to prove that appellee intended to abandon the contract. The only reasonable construction to be placed on the last part of the letter so much relied upon by appellant is, that unless the two invoices therein mentioned were promptly paid appellee would not in the future enter into any other or new contracts with appellant. Moreover, it clearly appears from the correspondence of the parties after the 23d of June that there was no intention of either party to abandon or set aside the contract in question. As there was no evidence of an abandonment of the contract the court did not err in refusing to submit the question to the jury.

It is also claimed in the argument that the lead which was to be delivered in June and the spelter to be delivered in July and August were not tendered to appellant, as required by the contract, and hence an action could not be maintained for a breach of the contract. As to the lead, it is plain from the evidence that it was shipped to Chicago in June, 1893, by the direction of appellant. It also appears that the lead arrived in Chicago between June 21 and June 26; that a draft was drawn for the amount of the lead and sent through a bank on New York, with the bill of lading attached, presented, and payment refused. The lead was in Chicago ready to be delivered upon the payment of the draft representing the amount due for the lead, and the only reason it was not turned over was on account of appellant's refusal to pay. We think, when all the facts and circumstances are considered, the tender was sufficient. Moreover, if the tender was not sufficient appellant should have objected at the time, and, if he so desired, have required a production of the lead. This was not done. Indeed, no objection was made in regard to the sufficiency of the tender. The only reason appellant gave for refusing to accept the bill of lading and pay the draft drawn for the lead was, he

claimed appellee owed him a small bill, growing out of another transaction, and on this account, and this alone, he refused to receive the lead. If the tender was not sufficient appellant should have said so at the time, and having failed to do so at the proper time he cannot now be heard to object.

In reference to the delivery of the spelter but little need be said. By the contract the lead and spelter were to be shipped to Chicago or East St. Louis, at appellant's option. The manner in which appellant exercised his option was by giving appellee shipping directions, and, of course, the shipping directions would have to be given in time to enable appellee to ship within the stipulated months. It appears that appellee on July 17 and August 10 wrote appellant for shipping directions for the spelter to be delivered in these two months, and in the letter notified appellant that unless he sent directions by a certain date, which was the latest date which would enable appellee to ship the spelter within the stipulated period, appellee would infer appellant did not intend to accept the spelter. No reply was made to these letters asking shipping directions, but on July 27 appellant wrote that he would not give shipping directions unless "things turned out satisfactorily,"—meaning, doubtless, that he would not give shipping directions for the spelter unless appellee would adjust his alleged claim of \$133.99. After receiving the notice of July 17 and August 10, the refusal of appellant to give any directions in regard to shipping the spelter may be regarded as a refusal to accept the spelter, and appellant having refused to accept, appellee was under no obligation to ship. Indeed, it could not know where to ship the spelter until appellant had exercised his option and notified it to which one of the two places the goods should be shipped.

It is also claimed that the court erred in the admission and exclusion of evidence, but upon an examination of the record we find no substantial error in that regard.

It is also insisted that it was erroneous to allow interest on plaintiff's demand. The record fails to show that interest was allowed in determining the amount due the appellee, and hence there is nothing before us upon which the position of counsel in reference to interest can be sustained.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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HELEN CULVER v. WEST CHICAGO PARK COMMISSIONERS,  
and  
E. LUTHER HAMILTON v. SAME,  
and  
JOSEPH KOSTNER v. SAME.

*Opinion filed October 13, 1899.*

These cases are controlled by the decision in *Cummings v. West Chicago Park Comrs.* 181 Ill. 136.

APPEAL from the County Court of Cook county; the Hon. W. T. HODSON, Judge, presiding.

WILLIAM W. GRINSTEAD, for appellant Culver; J. J. PARKER, for appellant Hamilton; and FANNING & HERDLICKA, for appellant Kostner.

FRANCIS A. RIDDLE, and H. S. MECARTNEY, for appellees.

Per CURIAM: The decision in the case of *Cummings v. West Chicago Park Comrs.* 181 Ill. 136, disposes of the questions presented by the records in these cases, and the judgments here must follow the judgment there.

For the reasons given in the opinion in the *Cummings case*, the judgments entered in these cases by the county court of Cook county are affirmed.

*Judgment affirmed.*

## THE CITY OF CHICAGO

v.

GEORGE H. WILLIAMS.

*Opinion filed October 19, 1899.*

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1. MUNICIPAL CORPORATIONS—*city not liable for torts of police officers.* A city is not liable for torts committed by its officers in the exercise of police powers.

2. SAME—*city should not defend police officers for torts.* It is not the duty of the corporation counsel to defend, at the expense of the city, a suit to recover damages for false imprisonment, brought against police officers individually and to which the city is not a party.

3. SAME—*city cannot contract for stenographic work at trial of police officer for a tort.* A city, authorized by its charter to appropriate money for corporate purposes only, has no right to contract for stenographic work to be performed in a suit brought against its officers for their own torts and to which it is not a party.

4. SAME—*expense of defending personal suit against police officer can not be paid from corporation counsel's appropriation.* The expense of defending damage suits brought against city officers for torts for which they are individually liable only, cannot be paid out of the contingent fund appropriated for legal expenses.

*City of Chicago v. Williams*, 80 Ill. App. 33, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

This is an action in assumpsit, brought by the appellee against the appellant to recover the sum of \$677.30, alleged to be due him upon an oral contract with the city made in 1897 to do stenographic and typewriting work to that amount in a certain action tried in the superior court of Cook county, brought by one Ella C. Quinlan against John J. Badenoch and John E. Fitzpatrick, which work is alleged to have been done under said agreement. The declaration contains the common counts only. The bill of particulars recites, that the claim, upon which the present suit is brought, is for services rendered to the city of Chicago by the appellee as court stenographer in a

cause entitled *Quinlan v. Badenoch* tried in 1897, "the said Badenoch being at one time chief of police of the city of Chicago, and the plaintiff therein having been employed in behalf of the city through the office of the corporation counsel of said city of Chicago."

At the close of the plaintiff's evidence in the case, the defendant, the city of Chicago, made a written motion to exclude from the jury all evidence on the part of the plaintiff, and to give to the jury the following written instruction: "The court instructs the jury to find the verdict for the defendant." The court refused to so instruct the jury, and marked the word "refused" on the instruction, to which the defendant excepted.

The defendant, by its counsel, then offered in evidence the court files in said case of *Quinlan v. Badenoch*, which were admitted in evidence. The defendant then again asked the court to give the jury the following written instruction, to-wit: "The jury are instructed by the court to find a verdict for the defendant." The court refused to give such instruction, and marked the same "refused," to which the defendant excepted. Thereupon, the jury rendered a verdict in favor of the appellee, the plaintiff below, for the above amount. Motion for a new trial was overruled, and judgment was rendered upon the verdict. An appeal was taken from this judgment to the Appellate Court, where the same has been affirmed. The Appellate Court has granted a certificate of importance.

CHARLES S. THORNTON, Corporation Counsel, and  
THOMAS J. SUTHERLAND, for appellant.

JUDD & HAWLEY, for appellee.

MR. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The first consideration, presented by the record, relates to the character of the suit, in which the services are alleged to have been rendered. The suit was brought

by Ella C. Quinlan against John J. Badenoch and John E. Fitzpatrick to recover damages for false imprisonment. John J. Badenoch was superintendent of police in the city of Chicago in 1895, and John E. Fitzpatrick was a police officer in that city at that time. These officers caused the arrest and forcible detention of Ella C. Quinlan, because they suspected her of complicity in certain crimes. She thereupon brought suit, claiming damages against them personally because of her arrest and detention. Badenoch and Fitzpatrick were defended in that suit by an attorney occupying the position of assistant corporation counsel to the city of Chicago, and by another attorney not connected with the law department of the city. Appellee claims, that he acted as stenographer on behalf of Badenoch and Fitzpatrick in the trial of that case, and that he performed services therein as such stenographer to the amount in value of the claim here sued upon. Appellee contends that he did the work for the city of Chicago, and that the city is liable to him for fees charged by him for his work as stenographer. He also claims that the city made a contract with him to do this work for it, or, in other words, that he was "employed in behalf of the city through the office of the corporation counsel of said city."

It is to be noted that the suit brought by Quinlan was not brought against the city of Chicago, but was brought against two of the city's police officers, who had improperly and wrongfully made an arrest. The city was not liable to Ella C. Quinlan because of the arrest so made by two of its police officers. If the charge against them of making an illegal arrest was true, they alone were liable as individuals.

Police officers are not agents or servants of the city, appointing them, within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the non-feasance or misfeasance of the officers of its police. There is an implied or common law liability

for the negligence of municipal officers in the performance of corporate acts, which have relation to the management of the corporate or private concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation. But where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred.

In *Town of Odell v. Schroeder*, 58 Ill. 353, where a party was charged before a justice of the peace with the violation of a town ordinance by committing an assault and battery, and was arrested therefor, and confined in the town prison, it was held that a municipal corporation is not liable for the illegal and unauthorized acts of its officers in administering an ordinance; and that, although trustees and other officers of the town may, by the illegal and unwarranted exercise of power, render themselves individually liable, the town is not thereby rendered liable.

In *Wilcox v. City of Chicago*, 107 Ill. 334, where suit was brought to recover damages for an injury, sustained through the alleged neglect of a driver of a hook and ladder wagon, belonging to the city fire department, while such driver was engaged in the service of the city in saving property from destruction by fire, it was held that the members of the fire department, although appointed by the city corporation, are not servants and agents of the city for whose conduct the city is liable, but that they act rather as officers of the city charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, unless it is expressly given, and that the maxim *respondeat superior* has no application to such a case.

In *Culver v. City of Streator*, 130 Ill. 238, where a person had received a personal injury from one of the officers of

an incorporated city, who, while enforcing an ordinance of the city which prohibited the running at large of unlicensed and unmuzzled dogs, attempted to kill a dog, and, through negligence, shot and wounded such person, it was held that the city's officers, appointed or employed by the city, are not its agents or servants, so as to render the city responsible for their unlawful or negligent acts in the discharge of their duties. In the latter case it was said, that the city is not liable for assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city, nor for illegal and oppressive acts of officers committed in the administration of an ordinance, nor for an arrest made by them which is illegal for want of a warrant.

In *Craig v. City of Charleston*, 180 Ill. 154, where an officer had been appointed by the city to keep a street free from obstructions, and, while in charge of the street, had made an unjustifiable assault upon plaintiff resulting in serious injury to the latter, it was held that, in such a case, the city is not liable for injuries received; and we there said, that a "municipal corporation, while simply exercising its police powers, is not responsible for acts of its officers in violation of the laws of the State and in excess of the legal powers of the city." In the performance of its police regulations a city cannot commit a wrong through its officers in such a way as to render it liable for their torts; where the city is simply exercising its police powers, acts of its officers or agents, which are illegal and unlawful, are *ultra vires*; and a citizen has no remedy against the corporation for damages caused by such acts of its officers. (*Blake v. City of Pontiac*, 49 Ill. App. 543; *Arms v. City of Knoxville*, 32 id. 604).

It follows from what has been said, that the city of Chicago was not in any way liable in the suit brought by Ella C. Quinlan against Badenoch and Fitzpatrick. As the city was not liable, and was not a party to the suit, it was not the duty of the corporation counsel, or of any



of his assistants, to defend that suit at the expense of the city.

*Second*—Any contract, made by an assistant corporation counsel with a stenographer, authorizing the latter to perform services for the city in a suit to which the city is not a party, and in which the city can, under no circumstances, be held liable, is an invalid contract, and cannot be enforced. This must necessarily be so upon principle and upon authority.

The city of Chicago would have no power to make an appropriation of the public funds to pay the expenses of defending such a suit, as that which was brought by Quinlan against Badenoch and Fitzpatrick. The second paragraph of section 1 of article 5 of the City and Village act, which is the charter of the city of Chicago, gives to the city power "to appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation." To appropriate money for the defense of a suit for damages, brought against a police officer because of an illegal arrest made by him, is not to appropriate money for a corporate purpose. Such an appropriation of money would not be providing for the payment of the debts and expenses of the corporation. And if money could not be appropriated by an ordinance for the payment of the expenses of defending such a suit, a contract could not be made with a stenographer, or other person, by any officer of the city making the city liable to pay money therefor.

Counsel for appellee, introduced in evidence, upon the trial below, an ordinance of the city, which provides that the corporation counsel "shall superintend, with the assistance of the city attorney and prosecuting attorney, the conduct of all the law business of the city." This ordinance did not give the corporation counsel, or any one of his assistants, power to superintend the conduct of a lawsuit, brought against two of its police officers for the illegal conduct of the latter, because such lawsuit was

not in any sense a part of the law business of the city. The subject of a contract made by or on behalf of the city must relate to a matter, about which the municipality can lawfully contract. The city cannot lawfully contract in reference to stenographic work done, not for the city, but for officers of the city individually liable for their own torts. A city can only bind itself by such contracts as it is authorized by its charter to make; and all persons dealing with it must see that the municipal body has power to perform the proposed act. (*City of Danville v. Danville Water Co.* 178 Ill. 299).

"Public corporations may, by their officers and properly authorized agents, make contracts the same as individuals and other corporations in matters that appertain to the corporation." (1 Dillon on Corp.—4th ed.—sec. 445). The matters, involved in the contract here in controversy, do not necessarily appertain to the municipality, or any of its interests. The municipal corporation is a trustee for the public, and its funds cannot be used for the payment of claims, which are not authorized by law or statute, even though such claims may represent work honestly done. Their payment establishes precedents, which open the door to fraud. (*West Chicago Park Comrs. v. Kincade*, 64 Ill. App. 113).

Counsel for appellee also introduced in evidence, upon the trial below, one of the items of the annual appropriation bill for 1897, passed by the city council on March 18, 1897, the year during which the trial of the Quinlan case took place. The item was for the contingent legal expenses of the law department, and read as follows: "For the city attorney's office, \$20,000.00; for the corporation counsel's office, \$15,000.00." It is said, that the corporation counsel had a right to employ the appellee to act as stenographer in the Quinlan suit, and to pay him out of the contingent fund thus appropriated for legal expenses. But the appropriation was made for such legal expenses as properly appertained to the performance of

the duties of the city attorney and corporation counsel. As has already been stated, it did not fall within the line of their duties to defend damage suits against the city's officers for illegal torts committed by the latter.

In *Peck v. Spencer*, 26 Fla. 23, a suit was brought against the acting mayor of a town to test the validity of the latter's election; the town council authorized the acting mayor to employ counsel at the expense of the corporation to defend said suit; and it was held, that the corporation's funds could not be applied to the payment of the expenses of such a suit; that all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred; that the town council in that case had not the power, either express or implied, under its charter, to appropriate money in defense of contested elections; that such contests were personal; that the corporation could have no interest in the result, and that an appropriation to pay any one of the parties the expenses he might be put to was without legal authority. In the Florida case, the court say: "An ordinance making an appropriation of the funds of a town or city, derived from taxation, for purposes wholly beyond the purview of municipal grant, is a wrongful appropriation of the funds held in trust for the tax-payers and people to pay the alimony and legitimate expenses of the town or city, and is, in short, *ultra vires*, null and void." The doctrine, that the appropriation of public funds for a purpose beyond the purview of municipal grant is void, necessarily involves the doctrine, that a contract by the city or any of its officers to pay out public funds for such purpose is illegal and void. (10 Am. & Eng. Ency. of Law, p. 962).

For the reasons above stated, we are of the opinion that the appellee had no right of recovery in this case, and that the court below erred in not instructing the jury to find for the defendant below, the appellant here.

Accordingly, the judgments of the Appellate Court and of the superior court of Cook county are reversed and the cause is remanded to the latter court with instructions to proceed in accordance with the views herein expressed.

*Reversed and remanded.*

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MATHILDE REGNERI

v.

FRANK J. LOESCH, Trustee.

*Opinion filed October 16, 1899.*

APPEALS AND ERRORS—*when no question of law is presented to Supreme Court.* No question of law is presented to the Supreme Court for review in an action of ejectment tried by the court without a jury, where no objection was made to the admission or rejection of evidence, or any exception taken to the overruling of the motion for a new trial, or to the finding, or to the entry of judgment, or any propositions of law submitted.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

CHARLES PICKLER, for appellant.

FREDERICK PEAKE, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action of ejectment by appellee, against appellant, begun in the circuit court of Cook county on December 23, 1898. To the declaration appellant filed a plea of not guilty. A jury being waived, the cause was submitted to the court upon evidence, resulting in a judgment in favor of appellee. From that judgment appellant appeals.

The only error assigned by appellant is, that the judgment is not sustained by the evidence and is contrary to law. No objection was made to the admission or rejection of evidence upon the trial. No exception was taken

either to the overruling of the motion for a new trial, nor to the finding, nor to the entry of judgment; nor were any propositions of law submitted, as provided by section 42 of chapter 110 of the Revised Statutes, to be refused or held. In this condition of the record there is no question of law before this court for review, and under the repeated decisions of this court the judgment of the trial court must be affirmed. *Gould v. Howe*, 127 Ill. 251; *Gage v. Goudy*, 128 id. 566.

*Judgment affirmed.*

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J. A. HAMILTON

v.

ELIZABETH WELLS, Admx.

*Opinion filed October 16, 1899.*

1. **PARTNERSHIP**—*it is the duty of the surviving partner to settle firm affairs.* It is the duty of a surviving partner, under the law, to make a settlement of the firm affairs, and only in this way can the interests of the deceased partner be ascertained.

2. **SAME**—*when partner purchasing deceased partner's interest cannot enforce subsequently discovered liability.* A surviving partner who, upon purchase of the interest of the deceased partner, assumes the debts shown by the books and papers of the firm, cannot enforce against the deceased partner's estate a subsequently discovered liability of the firm not shown by the journal and daily balance book, but which appears from a register and other papers of the partnership, which were in his hands for about ten months before the purchase.

3. **SAME**—*partner's indebtedness to firm presumed to have been considered in fixing selling price of his interest.* A partner who sells his interest in the firm property cannot be presumed, in the absence of any agreement, to have sold his own indebtedness to the firm, but it will be presumed that such debt was taken into consideration in fixing the selling price.

4. **SAME**—*when purchasing partner cannot enforce claim against selling partner's estate.* A member of a partnership who purchases the interest of a deceased member cannot recover against his estate on the theory that the books were not correctly kept by him, when he thereby attempts to assert a claim which, if valid, would exist in favor of former partners, and where he was familiar with the business and had possession of its books before purchasing the interest.

*Hamilton v. Wells*, 81 Ill. App. 274, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. WILLIAM HARTZELL, Judge, presiding.

GEORGE W. WALL, and TURNER & HOLDER, for appellant.

DILL & WILDERMAN, M. W. WEIR & M. MCMURDO, and SNYDER & MCMURDO, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

On September 1, 1879, a partnership was formed for the purpose of doing a banking business at Marissa, in St. Clair county, Illinois. The firm was composed of J. C. Hamilton and William Kunze, who each contributed \$1500, and J. H. Hamilton, A. J. Meek and A. H. Wells, who each contributed \$1000, and the firm was organized and did business under the name and style of Hamilton, Kunze & Co., but the bank was styled the Bank of Marissa. On March 22, 1884, J. H. Hamilton sold his interest in the firm to A. H. Wells. On April 1, 1886, William Kunze sold his interest in the firm to said Wells, and on January 2, 1891, A. J. Meek also sold his interest in the firm to A. H. Wells. On December 1, 1894, J. C. Hamilton sold his interest in the firm to J. A. Hamilton, when the firm name became Hamilton & Wells. Up to the time of the organization of this latter firm A. H. Wells was cashier of the bank and kept the books of the several firms that existed under the changes of the co-partnership, by reason of the different sales of the co-partnership interests to him. From the organization of the first firm until the death of Wells there had been five distinct firms, and the books of each were turned over to its successor, and this continued through all the firms. On June 25, 1895, Wells died intestate, and appellee was appointed administratrix of his estate, and on September 26, 1895, as such

administratrix, she sold to appellant the interest of the estate in the firm, and made the following assignment of such interest, which was accepted by appellant:

*"Know all Men by these Presents:* That I, Elizabeth J. Wells, administratrix of the estate of Albert H. Wells, deceased, for value received, do hereby sell, assign and transfer to J. A. Hamilton, of Marissa, Illinois, all the interest in the firm of Hamilton & Wells, bankers, of Marissa, Illinois, that Albert H. Wells, now deceased, had in said firm at the time of his death, the said sale to include the debts due the said firm as shown by the books and papers of said firm, except the interest of the said firm in certain notes enumerated and described in a schedule thereof hereunto annexed, marked 'Schedule A;' also except certain other notes enumerated and described in a schedule thereof hereunto annexed, marked 'Schedule B;' and also except the sum of \$411.02, which, it is claimed by J. A. Hamilton, may belong to J. H. Hamilton and William Kunze, but which amount, it is insisted by the undersigned administratrix of said estate, belongs to the said estate; which said sum is to be held in trust by J. A. Hamilton, to be delivered to the undersigned, as administratrix aforesaid, on or before the sixth day of July, 1897, with interest on said sum at the rate of three per cent per annum, provided the said J. H. Hamilton and William Kunze do not establish their claim to said sum according to law.

"It is a part of the consideration for this sale and assignment that the said J. A. Hamilton assumes the payment of all obligations, debts and liabilities of the said firm of Hamilton & Wells that the books and papers of said firm may show, or that may be known to exist from any other source of information, at the date of the delivery of this assignment to the said J. A. Hamilton; and that the estate of Albert H. Wells, deceased, shall be and is hereby discharged from all liability to pay the obligations, debts, and liabilities of the said firm of Hamilton & Wells, bankers, that the books and papers of said firm may show or that may be known at the delivery of this assignment, to the said J. A. Hamilton. As to other liabilities, if any, the said J. A. Hamilton is only to pay his proper share.

"Witness my hand and seal this twenty-sixth day of September, A. D. 1895.

ELIZABETH J. WELLS, [Seal.]

*As Administratrix, etc."*

At the time of the death of A. H. Wells the cash on hand in the bank exceeded the amount shown by the daily

balance books by more than \$2700. Among the books used by these various firms was one called the "Certificate Register," in which entries were made of moneys for which certificates of deposit had been issued. This register, from November 2, 1883, to March 23, 1893, inclusive, was kept by Wells, and of the certificates issued at and between these dates appellant produced eighteen, aggregating \$4573.60. The appellant filed a claim against the estate of Wells for the sum of \$4819.24, as the amount due him after allowing all just credits, deductions and set-offs, on the eighth day of June, 1896, and claimed the same was for money had and received and used by the deceased belonging to the plaintiff. On trial before the county court of St. Clair county the claim was disallowed, and the claimant appealed to the circuit court, where the claim was again disallowed, from which judgment an appeal was prosecuted by the claimant to the Appellate Court for the Fourth District, where the judgment of the circuit court was affirmed, and the claimant prosecutes this appeal.

The claimant insists that the above amount would be required after applying the assets of the bank to meet its liabilities, and he is asking that this amount be paid by the estate of Wells, as he claims the misfeasance of the latter caused the deficit, and insists that he, the claimant, constitutes the firm and bank and requires the sum stated to meet the liability of the bank to its depositors, and that this shortage is shown by the books and certificates of deposit outstanding and those which have been paid. The contention of the claimant is that this deficit results by reason of the fact that when money was received for which certificates were issued it was not charged on the daily balance or cash book, but that such money was misappropriated by Wells.

The books and papers of the several firms were in evidence, and whilst the imperfect manner in which the books were kept may have rendered it doubtful whether



the money belonging to the firm prior to the firm of Hamilton & Wells was correctly shown by the books or accounted for by the money on hand, we fail to find from the books and papers of the firm of Hamilton & Wells any evidence tending to show that Wells did not account to that firm for every dollar received while he was a member of it. There is no evidence in this record showing the terms on which the first members of that firm sold out their respective interests to those who purchased, save in the case of the sale made by Wells to the appellant. Only by a settlement of the firm affairs of Hamilton & Wells could the interests of the latter have been ascertained, and the appellant, as surviving partner, was, under the law, required to make such settlement of the firm affairs. Under the evidence he did not attempt to do this, nor file an inventory, as required by law. He had had charge of the business of the bank and was in possession of the books, where he was in the almost exclusive control for a period of nearly ten months, when, on an application to him as to whether he would sell his interest, he declined to do so but proposed to purchase the interest of the estate of Wells, and, after frequent meetings with the attorney for the appellee and much negotiating, finally made the purchase under the assignment heretofore set out. The purchase was made on his own judgment of what he was buying and for much less than three-fourths of the amount of the capital stock, it appearing that he paid for appellee's interest by issuing a certificate of deposit for \$2722 to her.

The claimant asked the court to hold that if the deceased, Albert H. Wells, while in charge of the bank and while keeping its books and cash, issued its certificates of deposit for cash deposited, which he entered upon the certificate register but not upon the journal or cash book or the general balance book, and did not place the cash for which such certificates were issued in the funds of the bank, and if such certificates were afterwards paid

out of the bank's funds, either by him or plaintiff acting as cashier, or if any of them are still outstanding and valid obligations of the bank, then Wells became liable to the bank for the amount of such certificates; and if the plaintiff owned an undivided one-fourth interest in the bank and purchased from the administratrix an undivided three-fourths on the basis of resources and liabilities as shown by the journal or cash book or general balance book, being then unaware of the acts of said deceased or of the liabilities of the bank so created in excess of what is shown by the journal or cash book or general balance book, and if such facts could not have been discovered by the exercise of ordinary care and prudence, then the plaintiff, as owner, has a claim against the estate for the amount of such certificates. Claimant submitted a further proposition, that if the deceased, while keeping the books and cash, issued certificates for cash deposited, which he entered upon the certificate register but not upon the journal or cash book or general balance book, and did not place the cash for which such certificates were issued in the funds of the bank, and if such certificates were afterwards paid out of the bank's funds, or if any of them are still outstanding, then the deceased became liable to the bank to the amount of such certificates; and if the plaintiff purchased the interests of the deceased upon the basis of resources and liabilities as shown by the journal or cash book or general balance book, being unaware of the liability of the bank so created in excess of its apparent liabilities as shown by the journal or cash book or general balance book, and if such acts and liability could not have been discovered by the inspection of the balances so made otherwise than by checking the entries in the register and comparing them with those in the journal or cash book and general balance book, then the plaintiff has a claim against the estate of the deceased for the amount of such certificates. These propositions the court refused to hold.

By the assignment signed by the appellee it is expressly stated that "it is part of the consideration of this sale and assignment that the said J. A. Hamilton assumes the payment of all obligations, debts and liabilities of the said firm of Hamilton & Wells that the books and papers of said firm may show, or that may be known to exist from any other sources of information, at the date of the delivery of this assignment; \* \* \* and that the estate \* \* \* shall be and is hereby discharged from all liability to pay the obligations, debts and liabilities of the said firm \* \* \* that the books and papers of said firm may show or that may be known at the delivery of this assignment to the said J. A. Hamilton. As to other liabilities, if any, the said J. A. Hamilton is to only pay his proper share." It is not claimed that the certificate register did not correctly show the date of the issue of certificates of deposit, and of their date of payment when payment had been made. The certificate register was a part of the books and papers of the bank, and it is not claimed that the evidence furnished by that certificate register would not correctly show such outstanding certificates. The evidence does show that by a careful examination of the certificate register, together with the journal or cash book and the general balance book, a correct determination could be had of any liability of the bank existing by virtue of the issuing of such certificates. The claim of appellant is sought to be made and is sought to be based on what is shown by the cash register, and what is omitted from the journal and general balance book. These books were in the hands of the appellant for about ten months that he was in charge of the business of the bank before his purchase of the interest of the estate, and by the examination which an ordinarily careful man would have made he could have determined if there were any errors resulting by the issuing of certificates and the failure to account for the money paid to the bank on account of such issue. These propositions

seek to make the liability of the estate depend on what is shown by the journal and daily balance book, and not by them together with other papers of the bank, including the certificate register, and for this reason it was not error to refuse to hold these propositions.

The interest of a partner in the firm property is his proportionate share of what may be left of the value of such property after the payment of the debts of the firm and after the deduction of his indebtedness to the firm, if any exists. When a partner makes a sale of his interest in the firm property the presumption is that he sells only his legal interest, and, in the absence of any contract or agreement to that effect, it cannot be assumed that such partner so selling out sold or intended to sell his own indebtedness to the firm, if any existed. This results from the presumption that arises that in the valuation upon which the sale is based the debt of the selling partner is taken into account and the value of his interest is thereby reduced to that extent as soon as the debt is paid. The sale by appellee of the interest of the firm transferred such interest as the estate had in the firm, which could only be ascertained by the settlement of the partnership accounts, and when such sale was made and the valuation determined of the interest of the estate, the presumption is that there was an adjustment of the accounts of the deceased member at that time and that all accounts were taken into consideration. *Norman v. Hudleston*, 64 Ill. 11; *Over v. Herrington*, 66 Ind. 365; *Thompson v. Love*, 111 id. 272; *Clark v. Carr*, 45 Ill. App. 469; *Baldwin v. Ball*, 48 N. Y. 673.

By the terms of the contract of assignment, which was accepted and acted on by the appellant, there is no contract, stipulation or agreement by which there is any exclusion of any indebtedness that may be due from the deceased partner from being considered as settled and having been taken into account when the valuation of the share of the estate purchased by appellant under

that assignment was fixed. Outside of the presumption arising from the law, the fact that it appears that on the face of the books the estate owned three-fourths of the capital invested, which was \$6000, and that the sale was made of \$4500 face value interest of that capital stock for a consideration of \$2722, tends to show that such indebtedness must have been taken into account. The evidence introduced for appellee is that of her attorney through whom the sale was negotiated, and it clearly appears that errors in the journal and cash books were alluded to by appellant, as also errors in the certificate register, and after frequent negotiations and much discussion the terms of sale were finally agreed upon and the sale and purchase consummated; that appellant purchased with full knowledge of the facts, or that by exercise of ordinary care he could have had such knowledge by the examination of the books which were in his care.

The frequent changes of the firm, consequent on the deceased having at different times purchased the interests of three different members, effected three different dissolutions and resulted in the organization of four different firms, each of which did business as firms under the name of the Bank of Marissa. The last firm that existed before the organization of the firm of Hamilton & Wells, which existed at the time of the decease of the latter, engaged in business as bankers, received money on deposit and issued certificates of deposit therefor, loaned money and took notes. By the sale of J. H. Hamilton to the appellant and the organization of the firm of Hamilton & Wells the fifth firm was organized. By the organization of these five different firms, and by the purchase of the various interests by the appellant or by the deceased, no interest was acquired by the last firm in the business of the former firms. The evidence for the claimant shows that the claim sought to be probated against the estate of the deceased was not a debt due the firm of Hamilton & Wells, but is an attempt by this

appellant to assert a claim which he claims to exist in favor of various former partners and in which he has no interest. The evidence for the claimant shows that he has attempted to distribute money that was on deposit in the bank on his theory that former partners were entitled to a portion thereof, and now seeks to recover from this estate on the theory that the books were not correctly kept and there is a liability in his favor. He is thus seeking to recover a debt which is not and was never due this firm of Hamilton & Wells. From the evidence introduced for appellee,—that of her attorney through whom the sale was negotiated,—it clearly appears that errors in the journal and cash book were alluded to by appellant, as also errors in the certificate register, and after frequent negotiations and much discussion the terms of the sale were finally agreed upon and the sale and purchase consummated; that appellant purchased with full knowledge of the facts, or what, by the exercise of ordinary care in examining the books which were in his keeping about ten months, would have resulted in such knowledge.

The appellant took by the assignment only the interest of the estate in the assets, and no more. The contract does not affect an assignment of a claim against the estate which the estate held against itself, and such sale is not presumed as a matter of law.

Appellee insists that there was no jurisdiction in the county court to hear and determine the question presented here, whilst it is insisted by the appellant that such jurisdiction existed. The three courts which have considered this question have entertained jurisdiction and determined it from all the evidence, and we deem it unnecessary to discuss that question.

The appellant is not entitled to recover, and there is no error in the record, and the judgment of the Appellate Court for the Fourth District is affirmed.

*Judgment affirmed.*

ROBERT C. BOEHM

v.

HENRY L. HERTZ *et al.**Opinion filed October 16, 1899.*

1. **STATUTES**—*when subject of act is sufficiently expressed in title.* The provisions of a statute are within its title when they relate to a particular subject indicated in the title, and are a part of or incident to it, or in some reasonable sense connected with or auxiliary to the object in view.

2. **CONSTITUTIONAL LAW**—*provisions of Appropriation act of 1897 to State Normal University are within its title.* The provisions of the act of 1897, (Laws of 1897, p. 79,) entitled "An act to make an appropriation for the ordinary and other expenses of the Illinois State Normal University at Normal, Illinois, and for the completion and equipment of its gymnasium building," are within the title of the act, and the act is therefore constitutional.

3. **SAME**—*when legislative determination of policy of State is conclusive.* Section 1 of article 8 of the constitution, requiring the General Assembly to provide a "thorough and efficient system of free schools," is a mandatory provision without restriction as to methods, and the legislative determination of the policy of the State in selecting its own agencies or instrumentalities for the purpose of carrying out such provision is conclusive.

4. **SAME**—*effect of contemporaneous legislative construction of constitutional provision.* Uniform, continued and contemporaneous construction given by the legislature to a constitutional provision, and generally recognized as its meaning or intention, affords a strong presumption that such construction is correct.

5. **SAME**—*appropriation act of 1897 to State Normal University is constitutional.* The provision of section 20 of article 4 of the constitution, that the State shall never pay, assume or become responsible for the debt of, or loan or extend its credit to, any public or other corporation, does not prevent the State from appropriating money to defray the expenses and complete buildings of the private corporation known as the Illinois State Normal University, which before the adoption of the constitution was an agency of the State for the education of teachers, and appropriations may properly be made to continue it as such.\*

CRAIG, J., dissenting.

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\*On the question of the public purposes for which money may be appropriated or raised by taxation there is a review of the authorities in a note to *Duggett v. Colgan*, (Cal.) 14 L. R. A. 474.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

GRANT FOREMAN, and JOHN C. WILSON, (LEWIS F. MASON, of counsel,) for plaintiff in error.

E. C. AKIN, Attorney General, (CHARLES L. CAPEN, C. A. HILL, and B. D. MONROE, of counsel,) for defendants in error.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Plaintiff in error filed a bill in which it is alleged he is a tax-payer, etc., and that the General Assembly of the State of Illinois, on June 14, 1897, passed a certain act, in which it was attempted to appropriate moneys for the ordinary and other expenses of the Illinois State Normal University, alleged to be a private corporation organized under an act of the General Assembly of the State of Illinois passed February 18, 1857. It is alleged that the appropriation is unlawful and in contravention of the constitution of the State, because it would be a misappropriation of the public funds and a perversion thereof to the injury of the complainant. The bill made defendants, Henry L. Hertz, as State Treasurer, James S. McCullough, as State Auditor, and the board of education of the State of Illinois, and prayed for an injunction restraining the payment of any money by the board of education, attempted to be appropriated under the act of June 14, 1897. The service on the board of education was quashed, and thereupon the complainant, by his solicitors, dismissed the bill as to that defendant. The other two defendants appeared and filed their demurrer to said bill for want of equity, which was sustained and the bill dismissed. The complainant sued out this writ of error.

The constitutionality of an act entitled "An act to make an appropriation for the ordinary and other ex-



penses of the Illinois State Normal University at Normal, Illinois, and for the completion and equipment of its gymnasium building," approved June 14, 1897, is presented on this record.

Plaintiff in error claims that the act above mentioned violates that part of section 13 of article 4 of the constitution which provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." We do not concur in this view. The act of June 14, 1897, is entitled "An act to make an appropriation for the ordinary and other expenses of the Illinois State Normal University at Normal, Illinois, and for the completion and equipment of its gymnasium building." The act appropriates, in addition to one-half of the interest of the college fund, the sum of \$28,506.44 per annum for the expenses of the board of education, payment of salaries, etc., and makes further appropriations for the completion of the gymnasium building and for the proper heating and equipment of the same. It is the province of the legislature to determine the comprehensiveness of a statute, subject to the limitations prescribed by the constitution. Without the restriction of the constitutional limitation above provided, the legislature might include in a single act any subject which it saw proper to prescribe as to duties and provide as to punishments. The limitation of the above provisions of the constitution goes no further than to declare that no matters are properly included in the act which are not germane to its title. Where all the provisions of the act relate to a particular subject indicated in its title, and are a part of or incident to it or in some reasonable sense connected with or auxiliary to the object in view, it can not be held such provisions are not within the title of the act. It was held in *Ritchie v. People*, 155 Ill. 98, (on p. 120):

"All matters are properly included in the act which are germane to the title. The constitution is obeyed if all the provisions relate to the one subject indicated in the title, and are parts of it or incident to it or reasonably connected with it, or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the bill shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act. Where there is doubt as to whether the subject is clearly expressed in the title, the doubt should be resolved in favor of the validity of the act." We fail to see wherein the subject matter of the act is not sufficiently expressed in the title, nor does plaintiff in error point out any special defect therein.

Plaintiff in error contends that by this enactment section 20 of article 4 of the constitution is violated, which is as follows: "The State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of, any public or other corporation, association or individual." This contention results from the claim made by the plaintiff in error that the appropriation of money made by the act of June 14, 1897, to the Illinois State Normal University, is violative of the foregoing provision of the constitution, inasmuch as that institution, it is insisted, is a private corporation. This position of plaintiff in error results from what has been said by this court in *Board of Education v. Greenebaum & Sons*, 39 Ill. 609, where it was held that this board of education was an eleemosynary institution, founded for the purpose of the gratuitous distribution of knowledge in regard to teaching and conducting common schools, and erected not at the expense of the State but of individuals; and at the time of the opinion in that case the salaries of the instructors and other employees were fixed by the board, and no appropriation had then ever been made from the State treasury for its maintenance.

By an act approved February 18, 1857, entitled "An act for the establishment and maintenance of a normal university," found in the public laws of Illinois for 1857, on page 298, it is provided that certain persons named shall constitute "the Board of Education of the State of Illinois," having perpetual succession, etc. By section 2 the Superintendent of Public Instruction, by virtue of his office, is made a member and the secretary of the board, and required to report to the legislature, at its regular sessions, the condition and the expenditures of the university. Section 3 relates to the meetings of the board of education. Section 4 provides that the object of the university shall be to qualify teachers for the common schools of this State, by imparting instruction in the art of teaching in all branches which pertain to a common school education, etc. Section 5 provides as to the first meeting of the board of education, and further provides that they "shall visit the cities, villages and other places in the State which may be deemed eligible, for the purpose to receive donations and proposals for the establishment and maintenance of a normal university," and provides the board shall fix the permanent location at the place where the most favorable inducements are offered for that purpose, provided that such location shall not be difficult of access or detrimental to the welfare or prosperity of the university. Section 6 provides as to the power of the board to the appointment of a principal, lecturers and instructors, and prescribes their duties, with power of removal, and power to fix text-books and make regulations for management, etc. Section 7 provides for gratuitous instruction for certain pupils. Section 8 provides the interest of the university and seminary fund, or such part thereof as may be found necessary, shall be appropriated for the maintenance of the university. Section 10 provides the term of the board of corporators, and for the filling of vacancies by the Governor, by and with the consent of the Senate. These are the

several provisions declaratory of the purposes of the university, its manner of organization, the filling of vacancies in the board of corporators, and their powers, etc.

Subsequently, an act of the legislature was passed February 14, 1861, entitled "An act to re-fund the interest on the college or university fund and appropriate the same for the use of the State Normal University," the preamble of which recites the act of admission of the State of Illinois into the Union, by which a certain percentage of the proceeds of public lands lying within this State was set apart to the State, to be appropriated by the latter for the encouragement of learning, of which one-sixth part was to be exclusively bestowed upon a college or university. The act of the legislature of 1861 then recites that one-sixth of the per cent of those proceeds on the first of January, 1851, amounted to \$122,607.54, and interest thereon to January, 1857, amounted to the sum of \$98,956.82, and for the purpose of carrying out the intention of Congress the legislature passed the act establishing a normal university, and made an appropriation of a part of said sum so held under the act of admission, or rather the interest thereon, payable to this board of education for the use of the normal university, etc. Section 3 of the act of 1861 provides that this corporation shall have no power to sell or convey any part of the property acquired since the passage of the act incorporating it, nor to create any liability against the State without the express sanction of the legislature. Section 4 provides that each county shall be entitled to gratuitous instruction in the university of two pupils, instead of one, as provided in the original act.

Shortly prior to the passage of the act of 1861, above mentioned, a contract for the construction of certain buildings was entered into in writing by the board of education above mentioned, through its building committee, and by reason of default in payment of the amount to be paid the contractors, a petition for a mechanic's

lien was filed, and under the legislation had prior to the entering into of such contracts, to-wit, prior to the third day of March, 1860, it was held that this university was an eleemosynary institution, founded for the purpose of the gratuitous distribution of knowledge in the art of teaching and conducting common schools, and erected not at the expense of the State but of individuals, and it was held that this corporation was liable to be sued and was a private corporation. *Board of Education v. Greenebaum & Sons*, 39 Ill. 609.

On February 25, 1858, Edwin W. Bakewell and Julia A. Bakewell, his wife, who joined in the deed for the purpose of relinquishing her inchoate right of dower, conveyed to the Board of Education of the State of Illinois forty acres of land immediately adjoining the university grounds. The only condition named in the deed was the following: "*Provided*, the Normal University, under the control of the said Board of Education of the State of Illinois, shall forever remain where now located." On February 9, 1860, the said Edwin W. Bakewell and his wife united in another deed to the said Board of Education of the State of Illinois, which, after reciting the execution of the former deed and the condition therein, contained the following: "And whereas, the said Edwin W. Bakewell and Julia A. Bakewell, his wife, are willing and anxious to vacate and annul said condition to said deed, and to make the title of the said Board of Education of the State of Illinois to the said land conveyed by said deed become and be absolute in fee simple: Now, therefore, this indenture, made and entered into this ninth day of February, 1860, by and between the said Edwin W. Bakewell and Julia A. Bakewell, his wife, and the said Board of Education of the State of Illinois, witnesseth that they convey a full and complete and unconditional title in fee simple in and to the said forty acres."

After the above enactments and after the execution of these two deeds, on February 28, 1867, the General

Assembly passed an act entitled "An act concerning the board of education and the Illinois Natural History Society," sections 1 and 2 of which are as follows:

"Sec. 1. The State Normal University, established by an act approved February 18, 1857, is hereby declared a State institution, and the property, real, personal and mixed, in the hands and standing in the name of the Board of Education of the State of Illinois, is the property of the State of Illinois and is by said board held in trust for the State.

"Sec. 2. Said board of education is hereby authorized to sell and dispose of the out-lands and lots standing in the name of said board, lying in the counties of Jackson, Woodford and McLean, except the site of the Normal University, and the farm of one hundred acres, more or less, in its immediate vicinity, and to appropriate the proceeds thereof towards the payment of the appropriations hereinafter named."

Whilst this had been the precedent legislation with reference to this university, the General Assembly, by a joint resolution passed in 1883, directed the State Board of Education to convey the above mentioned forty acres of land to Julia A. Bakewell. The board of education refusing to comply with that direction, the General Assembly in 1885, by a joint resolution, declared the title to the forty acres of land mentioned in the deed of Julia A. Bakewell and her husband to be and was vested in Julia A. Bakewell. Her demand for the possession of that land was refused by the board, whereupon she filed a petition in the circuit court of McLean county for a writ of *mandamus* commanding the Board of Education of the State of Illinois to execute to her a deed to the forty acres of land, which, on hearing before the court without a jury, resulted in the awarding of the writ, and the board of education appealed to this court. On that appeal two questions were presented, viz., whether the legislature had the constitutional power to order the conveyance of

this forty acres of land to be made to Julia A. Bakewell; and if so, whether it could exercise such power by joint resolution. This court, in the discussion of the first branch of the case, held, in accordance with what had been previously held in *Board of Education v. Greenebaum & Sons*, *supra*, that this corporation was a private eleemosynary corporation, which was not to be deprived of its property by the above mentioned joint resolutions of the legislature, and declined to pass upon the question whether the legislature could exercise the power of making the grant by a joint resolution. This is the effect of the opinion in *Board of Education v. Bakewell*, 122 Ill. 339.

Under this legislation with reference to this university the members of the board of education are appointed by the Governor, with the exception of the Superintendent of Public Instruction, who is made one of its members with special duties, and who is required to make biennial reports to the legislature. The object of the institution is to qualify teachers for the common schools of this State. Each county is entitled to gratuitous instruction of a certain number of pupils, and it is contemplated that each student shall agree to teach in the public schools of the State a certain period of time. The board of education is compelled to present to the Governor a full statement of expenditures, with vouchers, which must be approved by him before the next quarter's appropriation can be drawn from the State Treasury or an order therefor given by the State Auditor.

Normal schools are public institutions, which the State has the right to establish and maintain. The purpose of their establishment is to advance the public school system and create a body of teachers better qualified for the purpose of carrying out the policy of the State with reference to free schools, and provide for a more thorough and efficient system of the schools, whereby all the children of this State may receive a good common school education. They are the legitimate offspring of the School

law entering into our plan of education, whereby teachers may be taught how best and most effectively to discharge their duties. *Burr v. City of Carbondale*, 76 Ill. 455.

By section 1 of article 8 of the constitution it is provided: "The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education in this State." In complying with this mandatory provision the State has the right to select its own agencies or instrumentalities for the accomplishment of the purpose. To carry out this provision of the constitution there must be necessary expenditures of public moneys, resting upon considerations of the policy of the State with reference to the manner of compliance with this constitutional provision. Where a mandatory duty is imposed by the constitution on the legislature of the State, without restriction as to methods, the policy of the State may be determined by the legislature only, and its action must be regarded as conclusive as to the State policy. Normal schools being a recognized method of advancing the interests of the public school system which is mandatorily required of the General Assembly to be provided for, the legislature, having the power to prescribe the policy of the State with reference to such normal schools, had the power, before the present constitution as well as since, to provide by legislation that donations might be offered and taken into consideration in determining the place where certain institutions that are in their nature of a public character should be located. This was done under the act establishing the State Normal University, under the constitution of 1848, and has in more recent times been acted on by the legislature in the location of the Southern, Northern and Eastern Normal Schools and the Soldiers' Home. Because such donations have been made with reference to the last four named institutions they are not deprived of their public character. The normal university was authorized to receive donations by its



act of incorporation, its powers and duties, to a certain extent, being prescribed in that act; and the extension of State aid by the appropriation of interest on the college or university fund, and by the requirement that the school shall give gratuitous education to certain scholars of different counties of the State, was the adoption of a means to advance education in the common schools.

The constitution is merely a limitation upon the power of the legislature, which may do anything not forbidden by the express terms of the constitution or by necessary implication. The power of the legislature to adopt such agencies as it may deem proper to carry out the State policy would authorize it to provide for the education of teachers for the common schools, and this private corporation, created before the adoption of the present constitution, benefited and aided by the legislation of the State by reason of its receipt of the interest on the college and university fund provided for by the act of admission of the State of Illinois into the Union, was an agency of the State in the interest of the common schools when the present constitution was adopted, which included the provision of section 20 of article 4, that the State shall never pay, assume or become responsible for or loan or extend its credit to any public or other corporation. That provision of the constitution does not, by express terms or by necessary implication, prevent the State from using such agencies for the advancement of public school education that may be deemed proper under the policy of the State, which is exclusively left to be determined by the legislature under the provisions of section 1 of article 8, which necessarily require the expenditures of public moneys.

It is a principle of construction of a constitution, that it is proper to take into consideration the uniform, continued and contemporaneous construction given by the legislature and generally recognized, as to its meaning or intention, and such contemporaneous construction af-

fords a strong presumption that it rightly interprets the meaning and intention. *Bunn v. People*, 45 Ill. 397; *People v. Board of Supervisors*, 100 id. 495; *People v. Thompson*, 155 id. 451; *State v. Mayhew*, 2 Gill, (Md.) 487; Cooley's Const. Lim. 82.

After the act of 1867, appropriations were made from the State Treasury for the erection of buildings and the purchase of apparatus and appliances for this institution. At the first session of the legislature after the adoption of the present constitution of this State, and at almost every session since that time, the legislature has passed appropriation bills, which have received the approval of the Governor. Both the legislative and executive branches of the government have adopted a contemporaneous construction of the instrument, to the effect that this private corporation, authorized to receive donations from individuals for the purpose of advancing education, was a State agency for the instruction of teachers to be employed in public schools, which necessarily required expenditures of public money under an appropriation by the legislature, to be paid on warrants of the Auditor drawn on the State Treasury. Such expenditures, in consideration of benefits received by the State in the gratuitous instruction of teachers, could as properly be paid by the State to this private corporation as the appropriations made for the support of the Southern or the Northern or the Eastern Illinois Normal Schools, as the expenditures in each case are for one and the same end, and such appropriations are not an assumption of the debts or liabilities of the institution nor a loan or extension of credit in aid of this corporation.

Counsel for defendants in error present the question that this bill was obnoxious to a demurrer for the reason that the bill did not make proper parties defendant those who were directly affected by the decree to be rendered. Under the view we take of this case it is unnecessary to

extend this opinion by discussing this question, as what has been said disposes of the case.

The decree of the circuit court of Sangamon county is affirmed.

*Decree affirmed.*

MR. JUSTICE CRAIG: In my judgment this opinion overrules *Board of Education v. Bakewell*, 122 Ill. 339, and for that reason I cannot endorse the doctrine of the opinion.

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EZEKIEL SMITH *et al.*

v.

THE BATES MACHINE COMPANY.

. *Opinion filed October 25, 1899.*

1. **EQUITY**—*equity may entertain bill to enforce equitable assignment of particular fund.* A court of equity has jurisdiction of a bill filed to reach a part of a particular fund due to a contractor, who, it is claimed, equitably assigned it to the complainant, since the suit is one to enforce a trust.

2. **CONTRACTS**—*word "earnings" does not mean net earnings unless properly qualified or explained.* The word "earnings," as used in the acceptance of an order given by a sub-contractor on the original contractor, does not mean net earnings, where the drawee agreed to pay the amounts specified on the dates mentioned, provided the sub-contractor's earnings for the period named were sufficient to cover them, without further qualification or restriction.

*Smith v. Bates Machine Co.* 79 Ill. App. 519, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the HON. DORRANCE DIBELL, Judge, presiding.

HALEY & O'DONNELL, for appellants.

J. F. SNYDER, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This was a proceeding in chancery, begun in the circuit court of Will county, wherein the appellee, the Bates Machine Company, was complainant, and the Sanitary District of Chicago and appellants, with Dion Geraldine, were defendants. The original bill was against the sanitary district and appellants alone, and sought to enforce a claim against funds in the hands of the district due Smith & Eastman in satisfaction of an alleged indebtedness due from the latter to the complainant. Subsequently the bill was amended, making Patrick J. Sexton a party defendant with Smith & Eastman, and alleging that he had, by a secret assignment, become the owner of all of Eastman's interest in the firm of Smith & Eastman, though the business continued to be transacted in the name of the original firm; and also setting up that Dion Geraldine was a sub-contractor under the firm, and that he had become indebted to the complainant, for machinery and material furnished him in the performance of his sub-contract, in the sum of \$6600, and that in consideration of that indebtedness he gave to the complainant the following order:

"CHICAGO, *September 10, 1894.*

"Smith & Eastman, Original Contractors Section No. 14,  
Sanitary Drainage Canal, Lockport, Ill.

"GENTLEMEN—You will please pay to Bates Machine Company, Joliet, Ill., the sum of sixty-six hundred dollars (\$6600) out of moneys earned by me, as sub-contractor, on section No. 14 during the next six months, as follows: \$1000 out of November earnings, payable December 2 next; \$1000 out of December earnings, payable January 2 next; \$1500 out of January earnings, payable February 2 next; \$1500 out of February earnings, payable March 2 next; \$1000 out of March earnings, payable April 2 next; \$600 out of April earnings, payable May 2 next, and charge same to my account.

Very truly,

DION GERALDINE.

"Duplicate for Bates Machine Company.

DION GERALDINE."

This order was handed to Sexton on the day it bears date, and he made an endorsement thereon as follows:

"We accept the above order, and will agree to pay said amounts to Bates Machine Company on the dates mentioned, providing the earnings of Mr. Dion Geraldine for the months enumerated are sufficient to cover said amounts.

SMITH & EASTMAN,  
Per P. J. SEXTON."

It was further alleged, by way of amendment to the bill, that said order and acceptance amounted to an equitable assignment of the sums of money therein mentioned to the complainant, and the court was asked to so decree; also, that the sanitary district had notice of such assignment, and that it had in its hands a large amount of money, which should be applied in payment and satisfaction of the order. The defendants having answered the amended bill, the cause was heard, and a decree rendered in favor of the complainant on the amended bill alone, the holding of the chancellor being against it on the original bill. The defendants Smith, Eastman and Sexton alone appealed to the Appellate Court for the First District, where the decree of the circuit court was affirmed, and the same appellants again appeal.

A fuller statement of the facts will be found preceding the well considered opinion of the Appellate Court, by CRABTREE, J.

Here, as in the Appellate Court, two grounds of reversal of the decree of the circuit court are urged: First, it is insisted that the defense set up in the answer, that the complainant had a complete and adequate remedy at law, should have been sustained and the bill dismissed for want of jurisdiction; and second, that the word "earnings," as used in the acceptance of the order of September 10, meant, as used by the parties, only what should remain due Geraldine after paying his expenses during each month for labor, materials, etc.

On the question of jurisdiction we are clearly of the opinion that the law is with the complainant below.

The object of the amended bill was not to obtain a mere money decree against the defendants Smith, Eastman and Sexton, but to reach a part of a particular fund which it was claimed had been equitably assigned to it by the order of Geraldine. The order signed by Geraldine, directing the amounts named to be paid to the complainant, amounted, in equity, to an assignment of so much of his earnings as would be necessary to make the payments, and a trust was thereby created in the hands of Smith, Eastman and Sexton in favor of the machine company. (*Morris v. Cheney*, 51 Ill. 451,—citing 2 Story's Eq. Jur. sec. 1044.) We said in *Phillips v. Edsall*, 127 Ill. 535: "A part of a debt or chose in action is not assignable at law but can be assigned in equity, and in such cases a trust will be created in favor of the equitable assignee of the fund, and will constitute an equitable lien upon it." It is well settled that a valid equitable assignment of a part of a fund may be made before the fund is due or actually in being, providing it exists potentially. (See *Warren v. First Nat. Bank of Columbus*, 149 Ill. 9; *Young v. Jones*, 180 id. 216.) Nothing is better settled than that courts of chancery always have jurisdiction to enforce trusts, and on that ground alone we think it clear that the circuit court of Will county, sitting as a court of equity, had full jurisdiction and power to entertain the cause made by the amended bill. Here the fund, at the filing of the bill, was in the hands of the sanitary district, and having been equitably assigned to the complainant it held the same in trust.

As to the second proposition, we agree with the Appellate Court in saying we see no reason for giving the order and acceptance any such construction. The word "earnings," in its general acceptation, does not mean net earnings unless qualified in some way; and we are fully satisfied, from a consideration of all the facts and circumstances surrounding the parties at the time the order was executed and accepted, and their subsequent con-

duct, that there was no intention that it should have such limited or qualified meaning. The subsequent payment of \$3000 upon that order, by the acceptors, clearly shows that they did not at that time understand (as they now insist) that they were only to pay in the event that money remained in their hands after paying the expenses of the drawer in the performance of his contract, because they now say that so far from there being net earnings due Geraldine for those months, he was largely indebted to them. We find nothing in the record to the effect that Smith, Eastman and Sexton were required to pay for labor or material used by Geraldine in doing the work under his sub-contract, or that they were privileged so to do; and if it be conceded that if they had not made such payments the work would have necessarily stopped, still that fact would not release them from their liability upon the order, in the absence of such a condition in the acceptance. If, as is now contended, the intention was to limit their liability upon the order to such earnings as might remain after the payment of all expenses of the work, it would have been very easy and most natural that such intention should have been expressed in the writing, and it seems to us that to permit the construction now insisted upon to be placed upon the acceptance would be clearly violative of the rule that the terms of a written agreement cannot be varied or changed by parol.

In this view it is unnecessary for us to review the evidence or express any opinion upon the question whether or not the net earnings were sufficient to have paid the monthly installments mentioned in the order, it being impliedly admitted that the gross earnings were more than sufficient for that purpose.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

DAVID T. KYNER *et al.*

v.

PHILIP BOLL.

*Opinion filed October 13, 1899.*

1. **ENTAILS**—*Conveyance act changes effect of a deed creating an estate in fee tail.* A conveyance to a grantee and her "bodily heirs" and assigns creates an estate in fee tail general at common law, but, since the abolition of estates tail, passes, under section 6 of the Conveyance act, (Rev. Stat. 1874, p. 273,) an estate for the grantee's natural life only, with the remainder in fee simple absolute to the persons to whom the estate tail would, on the death of the grantee, first pass at common law.

2. **DEEDS**—*when equity may correct deed containing a mistake of law.* Equity will not refuse to correct a deed on the ground that the error is a mistake of law, where the scrivener, from ignorant presumption, has inserted in the deed words limiting the estate of the grantee contrary to the intention of the parties, who, upon discovering the mistake and before any estoppel in favor of third parties had arisen, attempted to correct it by a second deed omitting such words. (*Fowler v. Black*, 136 Ill. 363, distinguished.)

3. **SAME**—*what evidence competent in suit to reform deed.* In a suit to reform a deed, testimony as to what was said as to the necessity of a new deed when that executed and recorded was brought back to the scrivener who drew it, is admissible, as part of the *res gestæ*, on the question as to the reason and purpose of a second deed.

4. **SAME**—*when reformation of deed is not dangerous to stability of titles.* It is not dangerous to the stability of titles to real property to correct deeds upon parol evidence after the lapse of many years, when such evidence, taken in connection with subsequent deeds, tends to sustain a title, or at least the equitable right to it, which all parties have recognized and acted upon for many years.

APPEAL from the Circuit Court of Christian county;  
the Hon. WILLIAM M. FARMER, Judge, presiding.

NOBLE & SHIELDS, JAMES B. RICKS, and WILSON & WARREN, for appellants:

To justify a reformation of a written instrument upon the ground of mistake, the alleged mistake must, first, be one of fact and not of law; second, such mistake must be proved by clear and entirely satisfactory evidence, as

182	171
192	1257
d192	1261
j192	1265

182	171
199	1470
199	1471

182	171
202	1285



a mere preponderance of evidence is not sufficient; third, the mistake must be mutual and common to both parties to instrument. *Gordere v. Downing*, 18 Ill. 492; *Wood v. Price*, 46 id. 439; *Sibert v. McAvoy*, 15 id. 106; *Emery v. Mohler*, 69 id. 221; *Beebe v. Swartwout*, 3 Gilm. 162; *Fowler v. Black*, 136 U. S. 863; *Purvines v. Harrison*, 151 Ill. 219; *Ruffner v. McConnell*, 17 id. 212; *Oswald v. Sproehnle*, 16 Ill. App. 368; *Dinwiddie v. Self*, 145 Ill. 290; *Fowler v. Black*, 136 id. 363.

The evidence must be strong and most convincing. *Hunter v. Bilyeu*, 30 Ill. 228; *Cleary v. Babcock*, 41 id. 271; *McDonald v. Starkey*, 42 id. 442; *Ford v. Joyce*, 78 N. Y. 618; *Lord Ineham v. Child*, 1 Brown's C. C. 92.

Both parties to the original instrument must have labored under a reciprocal mistake common to both, and both must have had the same misconception in respect to the terms of the deed. *Page v. Higgins*, 150 Mass. 57; *Story's Eq. Jur.* chap. 155.

When the mistake is not as to the contents of the deed, but as to their effect, a court of equity will not correct it. A mistake of fact only will be reformed in equity. So if the word "heirs" is used in a deed by mistake for the word "children," it will not justify a reformation of a deed. (*Fowler v. Black*, 136 Ill. 363.) So in the present case, if the words "bodily heirs" were used by mistake for the word "heirs" it will not justify the decree rendered in the lower court.

A written instrument, carefully and deliberately prepared and executed, is evidence of the highest character, and will be presumed to express the intention of the parties to it until the contrary appears in the most satisfactory manner. 2 *Beach on Modern Eq. Jur.* sec. 546.

The deed in the present case was infinitely better evidence of the intention and meaning of the parties than all the evidence adduced. *Adams v. Robertson*, 37 Ill. 45; *King v. Isly*, 116 Mo. 155.

The declaration of the grantor will not be received to impeach or discredit his own grant or deed. *Williams v.*

*Evans*, 154 Ill. 98; *Dickie v. Carter*, 42 id. 376; *Guild v. Hull*, 127 id. 523; *Massey v. Huntington*, 118 id. 80; *Hart v. Randolph*, 142 id. 521; *Higgins v. White*, 118 id. 619; *McGinnis v. Jacobs*, 147 id. 24; *Francis v. Wilkinson*, id. 370; *Bevelot v. Lestrade*, 153 id. 625.

A deed will not be reformed by a decree of court so as to make it express something entirely different from what is written on its face, except upon evidence of the clearest and most satisfactory character, such as to leave no fair and reasonable doubt upon the mind as to the intention of the parties. *Harrison v. Sullivan*, 11 Ill. App. 423; *Warrick v. Smith*, 36 id. 619; 137 Ill. 504; *Dinwiddie v. Self*, 145 id. 304.

J. C. McBRIDE, and W. M. PROVIN, for appellee:

If a written agreement fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject matter and the import of technical words and phrases. But the rule is not confined to those instances. *Dinwiddie v. Self*, 145 Ill. 290.

Courts of equity are not limited to affording relief only in case of mistake of fact, but a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against upon proper proofs. 1 Beach's Eq. Jur. sec. 41, and note, and secs. 35-41; 2 id. secs. 538-552; *Purvines v. Harrison*, 151 Ill. 219; *McLennan v. Johnston*, 60 id. 306; *Hunter v. Bilyeu*, 30 id. 228; *Canedy v. Marcy*, 13 Gray, 373.

A mistake in a deed may be shown by parol evidence. This exception rests upon the highest motives of policy and expediency, for otherwise an injured party would generally be without a remedy. Even the Statute of

Frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong. 1 Story's Eq. Jur. sec. 155, *et seq.*; 2 Pomeroy's Eq. Jur. sec. 858.

Courts of equity will grant relief in cases of mistake in written contracts, not only when the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. 1 Story's Eq. Jur. sec. 162.

The exception to the general rule of evidence as to hearsay testimony is, that where the declarant is deceased, and where it appears that he possessed competent knowledge of the facts, and that his declarations were at variance with his interest, they are admissible in a suit between third persons, and such declarations need not be in writing. 1 Phillips on Evidence, p. 244, note 102; *White v. Chouteau*, 10 Barb. 202; Underhill on Evidence, sec. 66; 1 Greenleaf on Evidence, sec. 149.

The declarations of a party in possession of land, as to the character of his title, are receivable in evidence as part of the *res gestæ*, in favor of the party who derived title from him. 1 Phillips on Evidence, sec. 195, note; *Youngs v. Vredenburg*, 1 Johns. 158; 9 Am. & Eng. Ency. of Law, 315.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellee, Philip Boll, brought his bill in equity in the Christian circuit court against the appellants, David T. Kyner, Arthur L. Kyner, Mary Kyner Vinson, Annie Kyner Buck and Eva Kyner Windmuller, to reform and correct a deed of conveyance in his chain of title to the northwest quarter of section 5, township 14, north, range 1, west of the third principal meridian, in said county, and to enjoin the prosecution of an action of ejectment then pending against him, brought by all of the defendants except David T. Kyner. This appeal is from the decree entered in accordance with the prayer of the bill.

On October 20, 1862, Thomas Welch, the then owner of the land, and Lucinda, his wife, who were without chil-

dren of their own, by their deed of general warranty conveyed the land to their adopted daughter, Jennie, then recently married to said David T. Kyner. The deed was in consideration of love and affection and one dollar, and granted the premises "unto the said Jennie Kyner, bodily heirs and assigns;" *habendum* to "the said Jennie Kyner, her bodily heirs and assigns;" covenant with "the said Jennie Kyner, her heirs and assigns," of legal seizin in fee, etc., of the premises, and that the grantors had good right to convey the same to "said Jennie Kyner and her bodily heirs," and that "they will warrant and defend the same to said Jennie Kyner, her bodily heirs and assigns forever," etc. The deed also contained this clause: "And the said Thomas Welch and Lucinda Welch retains the support out of said land during their lifetimes." This was the deed reformed and corrected by the decree by striking out the word "bodily" wherever it occurred.

The evidence showed that July 18, 1863, a child, Eugene Kyner, was born to Jennie Kyner of her said marriage, and lived until July 28, 1864, when it died, leaving her childless at that time. For some reason, concerning which there is much controversy, Thomas Welch and his wife made and delivered to said Jennie Kyner another deed of general warranty, dated February 3, 1865. At this time Jennie Kyner was childless, but the appellant Mary, the oldest child now surviving, was then *en ventre sa mere* and was born June 22, 1865. This, the second deed, was in all substantial respects the same as the first, except that the word "bodily" was left out, and the support retained in the first deed was in the second covenanted for in these words: "And in consideration of said conveyance said Jennie Kyner, with her husband, David T. Kyner, agrees to support said Thomas Welch and Lucinda Welch during their natural lives and the lives of each of them." The first deed was acknowledged October 20, 1862, before William E. Pettis, a justice of the peace, and was filed for record November 25, 1862, and the sec-

ond deed was acknowledged February 20, 1865, before Henry Bloxam, justice of the peace, and filed for record April 2, or else April 12, 1865. The Kyners went into possession of the land, the precise date not appearing, but David T. Kyner testified that he began to break and improve the land in 1863, and afterwards built a small house upon it, put a hedge around it and put it in cultivation. In 1882 he negotiated a sale of it to appellee, Boll, for its then full value, \$6885, representing to Boll at the time that the title was all right, and he and his wife, Jennie Kyner, by their deed of general warranty dated November 24, 1882, conveyed the premises to Boll, Boll paying in cash all of the purchase money except \$4000, and securing that amount by a mortgage to Kyner on the property, which was two years afterward paid off by Boll and canceled by Kyner. Upon receiving this conveyance Boll took possession of the property and improved it, until at the time this suit was commenced it was of the value of \$10,000. Jennie Kyner died August 29, 1890, at the age of forty-six years, leaving surviving her her husband, David T. Kyner, and the four other appellants, her children. The suit in ejectment by said four appellants against Boll was not commenced until July 16, 1896.

By the first deed Jennie Kyner would have taken an estate in the land, which at common law, or rather after the enactment of the statute *de donis*, would have been an estate in fee tail general, such being the effect of the words "bodily heirs" upon the title; but by the sixth section of chapter 23 of the Revised Statutes of 1845, which was in force when the deed was made, and which is now section 6 of chapter 30 of the Revised Statutes of 1874, estates tail are abolished and the first grantee is seized as for her natural life only, and the remainder passes in fee simple absolute to the persons to whom the estate tail would on the death of the grantee in tail first pass according to the course of the common law. (*Dinwiddie*

v. *Self*, 145 Ill. 290.) Such was the proper construction of the first deed as drawn. When the first child, Eugene, was born, he took, as the deed read, an estate in fee simple in the land, subject to the life estate of his mother, Jennie Kyner, and subject also to be opened to let in after-born children of his mother, who would become tenants in common of the fee with him. (*Frazer v. Supervisors of Peoria County*, 74 Ill. 282; *Lewis v. Pleasants*, 143 id. 271; *Voris v. Sloan*, 68 id. 588.) When the child Eugene died before the birth of another child, such fee so vested in him passed to his heirs-at-law, who were his father and mother, subject to be divested *pro tanto* to let in after-born children. It is plain, therefore, that, if the first deed controlled the title according to its terms, David T. Kyner and Jennie Kyner, when they conveyed to Boll, were, subject to the life estate in Jennie Kyner, the owners in fee of an undivided one-fifth of the land, and the other appellants, their children, were the owners of the other four-fifths. This effect, as above stated, of the first deed, if not reformed as the product of a mistake, is conceded by the appellee by his bill to enjoin the ejectment suit and to correct the alleged mistake by striking out of the deed the word "bodily" wherever it occurs.

John Armstrong, a witness for the complainant, testified that in 1864-65 he lived in the neighborhood where the Welches and Kyners resided, and was well acquainted with them, and with Bloxam and Pettis, the two justices of the peace; that Bloxam and Pettis and Welch died several years before this suit was brought; that in the winter of 1864-65 he was in Pettis' office, where Pettis was writing a bond for him, when Bloxam and Thomas Welch came in together, and Bloxam presented a deed to Pettis and asked why he put the word "bodily" in there; that it should not be in there; that it was not Mr. Welch's intention and that he wanted it changed, and that was their object there at that time; that Mr. Welch also said it was his intention to make Mrs. Kyner a deed so she

could do what she pleased with the property; that Pettis replied that the word "bodily" had no meaning in the deed—that any heirs were bodily heirs; that Bloxam and Pettis had quite a dispute about it, and that Bloxam said there would be another deed made to correct that one, and Pettis replied that if they made a dozen deeds they would be of no account,—that they could make but one. The second deed was made soon after this conversation, and was acknowledged before Bloxam. This witness testified also that he saw the deed which Bloxam had brought in, and thought it was in Pettis' handwriting, which he knew well. The complainant produced other witnesses, who testified that while Thomas Welch was the owner of the land they heard him say that he intended to give it to his adopted daughter, Jennie Kyner; that all he wanted was his support, and that he was not afraid that Dr. Kyner and Jennie would not keep him. Welch had but little, if any, other property, and the confidence he expressed in Dr. Kyner, in connection with the other reliable evidence in the record, does not tend to prove that he had any desire or intention to convey the property in such a way as to put it beyond the control and disposition of his adopted daughter and her husband. The land was unimproved prairie land, and required much labor and the expenditure of considerable money to convert it into a cultivated farm, and the testimony of Dr. Kyner shows that they were unwilling to make such expenditure with the title in the condition it was left in by the deed of 1862. True, he did not testify that any mistake was made in drawing that deed, but to the contrary, and that their dissatisfaction was with the possibility of a reverter of the title to Welch or his heirs in case of a failure of issue of Jennie Kyner.

While we are of the opinion that, in the light of all the evidence in this case, it would be unsafe to base a judgment upon the testimony of Dr. Kyner, still it tends, in connection with other evidence, to show very strongly

that the first deed did not properly express the wishes or intentions of the parties to it. But whether or not there was such a mistake in its preparation as to authorize a court of equity to reform and correct it is a much more serious question. Ordinarily, after such a lapse of time it would be unsafe to reform a deed upon the testimony of witnesses based upon their recollection of events and conversations occurring so long before. But in the case at bar it is proved beyond doubt that both parties were dissatisfied with the first deed and made an effort to put the title in fee in Jennie Kyner. This, we think, aside from the testimony of witnesses, is shown by the deed of general warranty of the Welches made to her February 3, 1865, of the same property, which omitted the word "bodily" and contained full covenants. This deed was accepted, filed for record and acted upon by Jennie Kyner, and she thereafter, as well as her husband, treated the property as her own, absolutely, in every way,—even to the extent of selling and conveying it for its full value, with full warranty of absolute title. It is not, of course, meant to be said that the title fixed by the first deed could be changed in this manner by the second deed, but it is meant to be said that the execution, delivery and acceptance of the second deed, and the subsequent attitude of the parties toward the property and its title, tend strongly to prove one of three propositions, viz.: First, that by mistake of the scrivener the word "bodily" was inserted in the first deed against the intention of the parties; or, second, that they were mistaken in the meaning and legal effect of the deed as so drawn; or, third, that after the conveyance had been made, and before the second deed, they changed their minds, and desired to change the title and to enlarge the interest therein in Jennie Kyner.

Dr. Kyner's testimony, if relied on, tends to establish the third proposition. He testified that he was present when the first deed was drawn; that it was drawn by



Henry Bloxam, who "was counted a pretty good doctor and lawyer;" that Welch told Bloxam how he wanted it drawn, so that he and his wife would have their support out of it, and that Jennie should have a life estate in it but couldn't sell it, and he put in the words "bodily heirs" so the children would have it afterwards; that he "wanted it to her and her bodily heirs—*bodily heirs* was the expression." The acknowledgment of the deed was taken by William Pettis, a justice of the peace, and Kyner testified that Bloxam, who he said wrote the deed, was not then a justice, but that he went for Pettis to take the acknowledgment. It was afterward, however, made to appear that Bloxam was a justice of the peace at the time the deed was drawn, and Kyner then testified that the reason he did not take the acknowledgment was that Lucinda Welch had an antipathy to Bloxam, which lasted until after the deed of 1865 was acknowledged before him, but that she was so anxious to have the second deed drawn that she was willing to acknowledge it before anybody. The first deed was not produced on the hearing. Notice had been served on appellants to produce it, but Dr. Kyner testified that he delivered it to Boll with all the other papers when Boll purchased the land. Boll, however, testified that it was never delivered to him and that he never saw it, and that he never had any knowledge of it until objections were made to his title when he tried to borrow money by securing it with a mortgage on the land, in the fall of 1895. Notwithstanding Dr. Kyner testified that all of the papers were delivered by him to Boll, he, or some of the defendants, upon notice produced the deed of 1865, and it may well have appeared to the chancellor, who saw and heard the witnesses testify, that the defendants to the bill withheld from the evidence in the case the original deed of 1862, and thus prevented a definite determination, from the handwriting, of the question whether Bloxam or Pettis wrote that deed,—a question of considerable importance in determining the

ultimate question whether or not the scrivener, alleged to have been Pettis, inserted by mistake the word "bodily," and, incidental thereto, of importance also in weighing Kyner's testimony that he was present, saw Bloxam write it and heard Welch's directions to Bloxam.

The effect of Dr. Kyner's testimony was that he knew from the beginning that the first deed was so drawn as to give to his wife only a life estate, with the remainder in fee to her children; that in case she had no children the title to the land would, on her death, revert to Welch or his heirs, Jennie Kyner not being entitled to inherit from Welch, and that it was this possibility of a reverter that caused him and his wife to desire, and Welch to make, the warranty deed of 1865,—that is, in case she should die without children the title should pass to her heirs and not to Welch's. This, he testified, was the only purpose of that deed, and says that he went with Welch to Springfield, and they so told the attorney who prepared the deed. One serious weakness of this testimony is, that all this, including the making and delivery of the second deed, occurred after the birth of Eugene Kyner, who, as the first deed was drawn, took the fee, as before pointed out, and also after his death, and after the fee vested in him had passed to Kyner and his wife, and when there was no longer any possibility of a reverter. Besides, as the appellant Mary Kyner Vinson, the next child, was then *en ventre sa mere*, it would hardly seem that the fear of dying without children and thereby losing the property could have been so potent a factor in causing the execution of the second deed as the desire to correct the error in the first deed, and thereby to acquire, as their subsequent conduct showed they supposed they would, the full title to the property. Dr. Kyner testified also, in effect, that although he knew that his children owned the remainder in fee in the land, he sold the land to Boll for its full value, and, with his wife, gave Boll a deed of general warranty conveying it in fee to him and said nothing

to Boll about his children's interest. He testified, also, that when Boll discovered, thirteen years after his purchase and five years after the death of Jennie Kyner and the vesting of the title in her children, that there was a defect in the title because of the first deed, and applied to him, Kyner, to procure quit-claim deeds from his children, he promised Boll he would do so, accepted pay from Boll for his services in that behalf, wrote a letter to his three daughters, who lived away, for Boll, to be enclosed by Boll to them, with money to pay the expense of obtaining the execution of the deeds, but secretly wrote to his children advising them not to sign the deeds, and set to work to obtain the land for them by procuring information from counsel as to their rights in the premises, and aided in the prosecution of this suit. In view of these facts the learned chancellor in the court below could not, in passing upon the facts, have reasonably relied on Dr. Kyner's testimony as to what took place when the first deed was written, nor as to the object and purpose of the second deed. At the time the discovery of the defect in the title was made Jennie Kyner had been dead five years, and her children, the appellants, were aged as follows: Mary Kyner Vinson thirty years, Eva Kyner Windmuller twenty-seven years, Arthur Kyner twenty-four years and Anna Kyner Buck twenty-one years, and no claim of any interest had been made by any of them, or by Dr. Kyner on their behalf, notwithstanding the Statute of Limitations had nearly run against them. It also appeared from the evidence that in 1872 Welch and wife made a quit-claim deed to Jennie Kyner to the land to enable Dr. Kyner to procure a loan on the same, and that he did procure such loan to the amount of \$2500, his wife, Jennie Kyner, joining with him in the deed of trust securing the same. R. H. Woodcock, a banker, testified that in February, 1896, Dr. Kyner, in a conversation with him, said that it was not the intention of Mr. Welch to make the deed to the Kyner heirs, but to make it to Jen-

nie Kyner, and that he made the second deed to put the title in Jennie Kyner; that he never intended to make it, to the children, but that he made it all the same and that their title was good.

It is clear to our minds that, notwithstanding the legal effect of what was done when the first deed was made may not have been what the grantors and grantees, the Welches and the Kyners, supposed, still, after the making of the second deed, in 1865, somewhat over three years after the first deed was made, they rested in the belief, and acted upon the assumption for many years, that the full title to the property in fee was vested in Jennie Kyner, subject to the covenant of Dr. and Jennie Kyner to support and maintain the grantors. This covenant appears to have been complied with until Mr. Welch died, a few years before the property was conveyed to Boll, and his widow a few years afterward. It is urged by the appellants that the purpose of the second deed was, first, to prevent, by estoppel, the estate from reverting to the collateral heirs of Thomas Welch upon a possible failure of issue of Jennie Kyner; and second, to release the land from a lien retained in the first deed for their support, and to convert the interest released, into a mere personal covenant of the grantee, Jennie Kyner, and her husband. But, as we have seen, the remainder at that time had already vested and no reverter was possible, and there was no testimony whatever that either party desired or intended any change in the respect secondly above mentioned. Had they desired a mere personal obligation there would have been no necessity of incorporating it in the deed. Nor does this theory furnish any reason for leaving the word "bodily" out of the second deed. Besides, if such was the object of the second deed, we would expect to find the covenants limited to such object, and not to find a warranty to Jennie Kyner of a title which he had previously conveyed to her children. That they considered they still had a lien on the

land for their support under the second deed is shown by their quit-claim deed, given in 1872, to clear the title for a loan to Dr. Kyner. We are satisfied from the evidence that the purpose of making the second deed was not to cut off the supposed possibility of a reverter to Welch's heirs, nor to change his lien for maintenance to a mere personal obligation. Nor would it be consistent with the evidence to conclude that the first deed was drawn in accordance with the intentions of the parties, and that the second deed was made because they had changed their minds and wished to change the title by vesting it in fee in Jennie Kyner.

There remains, then, but one of two conclusions,—the first and second propositions already mentioned,—that can be maintained, namely, that the word "bodily" was inserted in the first deed by the mistake of the scrivener, or that the mistake of the parties is such a one of law that it cannot be corrected by a court of equity, but by which they must abide.

Counsel for appellants insist that whatever view we may take of the case upon other points, the conclusion must be reached that if there was a mistake in the first deed it was a mistake of law and cannot be corrected, and refer us to *Fowler v. Black*, 136 Ill. 363, and cases there cited, as sustaining their contention. We think the case at bar may be distinguished from those cited, and that the principle announced by them should not be carried to the extent of refusing relief where the scrivener, from ignorant presumption and against the intention of the parties, has inserted in the deed words limiting the estate which the parties intended the grantee should take, and which mistake, though it be in the legal effect of the words so inserted, the parties, upon discovering it and before any estoppel could operate in favor of third persons, have attempted to correct by another deed in which such words are omitted. It is well settled that there are many exceptions to the rule that equity will not correct

mistakes of law. Some of these exceptions are referred to in *Dinwiddie v. Self*, 145 Ill. 290, where a decree was affirmed striking out of a deed the very same words limiting the grantee's title as are involved in this case. There, upon the verbal contract for the purchase of land and at the instance of the father of the grantee, and without her knowledge or authority, the grantor made the deed to her and her "bodily heirs." No such limitation had been agreed upon or mentioned between the parties to the deed, and we held that the deed was properly reformed by striking out the word "bodily" wherever it occurred in the deed. It was there, among other things, said, quoting from Pomeroy's Equity Jurisprudence (sec. 845): "If a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject matter and as to the import of technical words and phrases. But the rule is not confined to those instances." So, also, in *Canedy v. Marcy*, 13 Gray, (Mass.) 373, it was said by Chief Justice Shaw that "a mistake in the legal effect of a description or in the use of technical language may be relieved against, upon proper proof."

It is insisted, however, that the testimony of Armstrong was incompetent as to what took place and was said between Welch, Bloxam and Pettis when Bloxam brought back to Pettis the first deed, (the evidence showing sufficiently, we think, that it was the first deed, no other deed answering the description having been made between the parties,) and as to what was said relative to the necessity of a second deed. The only objection made at the time this testimony was given was that it was irrelevant and immaterial. It certainly was not liable to

this objection, but treating the question of the competency of this testimony as open for consideration here, we are of the opinion that it was properly received and considered by the chancellor in the decision of the case. The reasons for, and the purpose to be accomplished by, the making of the second deed were matters of controversy on the trial. The deed itself was far from explicit on these points, and as explanatory thereof the testimony was admissible as a part of the *res gestæ*. True, this deed did not itself convey the title, and could only be treated as an attempt on the part of the grantor and grantee to correct the first deed, or to put in solemn and permanent form, and of record in the chain of title, the evidence of their intention to convey the whole title to Jennie Kyner. We are of the opinion that the evidence in question tended to explain the purpose of this deed and was sufficiently connected therewith to be a part of the *res gestæ*. Thus it was said in *Lander v. People*, 104 Ill. 248: "It is a well settled principle in the law of evidence, that whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper to also show any accompanying act, declaration or exclamation which relates to or is explanatory of such fact or event. Such acts, declarations or exclamations are known to the law as *res gestæ*." The second deed could not, of course, take away from appellants, who are the "bodily heirs" of Jennie Kyner, the title which the first deed, if uncorrected for mistake, conveyed to them. (See *Frazer v. Supervisors of Peoria County*, 74 Ill. 282.) But we regard it and the other evidence in the record sufficient to support the decree reforming the first deed.

We cannot regard as applicable to this case the argument that it is dangerous to the stability of titles to real property to correct deeds upon parol evidence after the lapse of so long a period of time, for here the parol evidence, in connection with the subsequent deeds, tends to

sustain a title, or at least the equitable right to it, which all parties recognized and acted upon for many years.

Other questions have been raised by counsel, but we regard them as insufficient to justify a reversal of the decree, and it will be affirmed.

*Decree affirmed.*

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GEORGE F. CASE

v.

OPHELIA E. PHILLIPS *et al.*

*Opinion filed October 13, 1899.*

1. **APPEALS AND ERRORS**—*objections not presented in Appellate Court are waived.* Objections not brought to the attention of the Appellate Court cannot be raised in the Supreme Court as ground for reversing the judgment of the Appellate Court.

2. **SAME**—*chancellor's exclusion of incompetent affidavit cures master's error in admitting it.* An objection that the master erroneously admitted an affidavit in evidence is unavailing on appeal, where the chancellor, upon exception to the master's report, excluded the affidavit and made his finding from other competent evidence.

3. **PAYMENT**—*when payment cannot be regarded as made by stranger.* Payment by a principal of a claim presented for merchandise delivered to his agent cannot be deemed a satisfaction of the demand by a mere stranger, and it extinguishes the obligation so far as the creditor is concerned.

4. **EVIDENCE**—*what evidence will establish plea of payment.* In the absence of countervailing proof, a plea of payment is established by evidence that the plaintiff's demand was interposed by him as a set-off in a former action brought by the defendant's principal, which was settled in full and discontinued by stipulation of the parties, without costs.

MAGRUDER, J., dissenting.

*Case v. Phillips*, 82 Ill. App. 231, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

182	187
f189	1820

182	187
210	1222



NEWMAN, NORTHRUP & LEVINSON, for appellant.

M. B. & F. S. LOOMIS, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery, filed by appellant, praying for a decree declaring a conveyance of certain real estate by one James W. Phillips, now deceased, to appellee Ophelia E. Phillips, his wife, was without consideration and in fraud of the rights of appellant as a creditor of the grantor.

In 1888 and 1889 said James W. Phillips was resident manager in Chicago of the James Cunningham Sons Company, a corporation engaged in the business of dealers in buggies, carriages and other vehicles. The appellant was then engaged in similar trade in Detroit, Michigan. He consigned three second-hand coupélets to the Cunningham company, and at another time three other second-hand coupélets and a hearse to said Phillips. The vehicles were to be sold for the benefit of the appellant. It is conceded the hearse was received, sold and accounted for by the Cunningham company. The coupélets were sold by Phillips and the full proceeds thereof were not accounted for to the appellant. The theory of the bill is, that said James W. Phillips, deceased, received the coupélets, not as manager for the Cunningham company, but in his individual capacity, and the demand sought to be enforced against the land is the balance alleged to remain unpaid of the proceeds of the sale of the vehicles. The alleged demand has not been reduced to a judgment, but the record does not present any question relative to the jurisdiction of equity in the cause. Answer was filed by the appellee Ophelia E. Phillips, one of the defenses presented being the demand had been paid to appellant by the Cunningham company. Issue thereon was joined by replication. The cause was referred to the master to take and report the proof and his conclusions of law and

fact. It appeared from the master's report the respective parties stipulated the only issue to be submitted and decided was as to whether the alleged claim of appellant had been paid and satisfied by the Cunningham company. Though counsel for appellant discuss other issues, they do not challenge, and have not in any manner challenged, the correctness of the report of the master that the contention was restricted, by voluntary agreement, to a single issue. The findings and conclusions of the master were adverse to appellant. The report was approved by the chancellor and decree entered that the bill be dismissed. The decree was affirmed by the Appellate Court on appeal, and this appeal has been perfected to review the judgment of the Appellate Court.

It is the contention of appellee it appeared from the proofs the appellant insisted the Cunningham company was legally liable to answer to him for the proceeds of the sale of the vehicles, and that he presented such liability, by way of plea or notice of set-off, in an action at law brought in the circuit court of Wayne county, in the State of Michigan, by the said Cunningham company against said appellant, and that the claim was adjusted and settled in that proceeding. Appellant contends this defense cannot avail to support the decree, for two reasons: First, because, as he insists, it did not appear from the record of the proceedings in the said suit referred to, that the claim of appellant was adjusted or paid; and second, that the Cunningham company was a stranger to the transaction between appellant and said Phillips, and that whatever was done in the suit referred to was without the knowledge or approval of the debtor, and that under such circumstances the payment, if proven, would not have the effect to discharge the debt. We will consider the contentions in the order as urged.

*First*—The appellees produced before the master a certified copy of the *narr.*, plea and notice of set-off, bill of particulars under such notice, and a stipulation of the

parties making disposition of the case of the Cunningham company against appellant in the circuit court of Wayne county, Michigan, and also a certified transcript of the orders of that court. The appellant seeks in this court to urge the master and the chancellor erred in admitting the bill of particulars and the stipulation for dismissal in evidence, on the ground neither of these documents constituted a part of the record in that cause and could not be authenticated by the certificate of the clerk of the court. The appellees contend neither of these objections was raised in the Appellate Court, and in pursuance of leave given in this court have filed here a certified copy of the brief and argument filed by the appellant in the Appellate Court. It does not appear from this brief the appellant presented these questions to the Appellate Court. The purpose of this appeal is to bring the judgment of the Appellate Court in review in this court. We cannot declare the Appellate Court erred upon a point or points not presented to it for decision. The failure of the appellant to call the attention of the Appellate Court to the alleged error was an abandonment of the assignment of such error. (*Wabash, St. Louis and Pacific Railway Co. v. McDougal*, 113 Ill. 603.) Objections not mooted in the Appellate Court cannot be raised in this court as ground for reversing the judgment of the Appellate Court. (*Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9; *Fidelity and Casualty Co. v. Waterman*, 161 id. 632.) It appeared from the pleadings in the action at law in the circuit court of Wayne county, Michigan, the Cunningham company claimed certain demands against the appellant, and that appellant pleaded as a set-off to such demands that the Cunningham company was indebted to him for the unpaid balance of the proceeds of the sale of the coupélets, and that the parties signed and filed in the court a stipulation, as follows: "It is hereby stipulated that the above entitled cause is settled in full and discontinued, without costs to either party." It did not appear the court made

or entered any order or judgment upon the stipulation, but it did appear the cause was disposed of by it. The chancellor held the pleadings in the Michigan case and the stipulation of the parties sufficiently established that the Cunningham company had settled and discharged the demand which the appellant was seeking to enforce by this proceeding. There was no countervailing proof. Indeed, the only other evidence touching upon the point tended to corroborate the view taken by the chancellor. There is no reason the ruling of the chancellor should be regarded as erroneous.

*Second*—Cases cited by appellant to the effect a party who has covenanted or promised must perform the engagement himself, and cannot plead in bar satisfaction or performance by a stranger, are not here applicable. The Cunningham company cannot be deemed a stranger to the transaction out of which the demand of appellant arose. He insisted it was liable to respond to him for the claim on the ground Phillips received and disposed of the vehicles as its general manager, and pleaded such alleged liability in defense in the action at law. Under such circumstances a satisfaction of the demand by it would extinguish the obligation, as far as the appellant is concerned. Whether a right would arise or demand exist in favor of the Cunningham company to recover is not here involved.

We need not discuss the contention the master erred in admitting the affidavit of one Strobridge in evidence, for the reason the chancellor, upon exception to the master's report, excluded the affidavit and made his finding from other competent evidence. The testimony the affidavit excluded supports the decree.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER, dissenting.

## THE VILLAGE OF ITASCA

v.

ERNEST C. SCHROEDER.

*Opinion filed October 19, 1899.*

1. INJUNCTION—*when injunction will not be denied on ground of remedy at law.* An injunction suit against a municipality to restrain its officers from so changing a street as to encroach upon his property, necessitating the removal of his fences, the destruction of shade trees, and resulting in permanent damage to his lands, will not be denied on the ground of an adequate remedy at law.

2. SAME—*what a compliance with statute authorizing an injunction to issue without notice.* It sufficiently appears that the rights of the complainant will be unduly prejudiced if an injunction is not issued immediately and without notice, under section 3 of the Injunction act, (Rev. Stat. 1874, p. 579,) when such fact is averred in the bill, and the complainant's affidavit to the bill is positive, and not upon information and belief.

3. EVIDENCE—*location of monument in survey may be shown by extrinsic evidence.* The location of an old bridge which is a monument in an old road survey may be established by extrinsic evidence in a controversy concerning the location of a road.

4. APPEALS AND ERRORS—*chancellor's finding of fact from oral testimony is not lightly disturbed.* A finding of the chancellor based on conflicting oral testimony will not be disturbed on appeal, as against the evidence, in the absence of clear and palpable error.

5. MUNICIPAL CORPORATIONS—*when a village is estopped to change location of street.* A municipal corporation which has acquiesced for forty years in the location of a street, which it has worked and improved at various times, and in the making of permanent improvements with reference thereto by adjoining owners, is estopped from so changing its location as to encroach upon the grounds of an abutting property owner.\*

6. SAME—*an execution for costs should not be awarded against a municipal corporation.* An execution for costs should not be awarded against a municipal corporation upon the granting of an injunction restraining the corporate authorities from changing the location of a public street.

APPEAL from the Circuit Court of DuPage county;  
the Hon. CHARLES A. BISHOP, Judge, presiding.

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\*The rights acquired, as against the public, by adverse possession of a highway or city street, are considered in a note to *Meyer v. Graham*, (Neb.) 18 L. R. A. 146.

This is a bill in chancery filed by Ernest C. Schroeder, the appellee, in the circuit court of DuPage county, to the October term, 1897, of said court, praying for an injunction, against the village of Itasca, impleaded with William Wischsteadt, William Pieper and Edward Pfluger, to prevent them from moving the road-bed of Main street, in the village of Itasca, west fifteen or twenty feet onto the land of complainant. The village of Itasca was not incorporated as a village until March, 1890. The road in question was laid out and platted by the highway commissioners of the town of Addison on the 21st day of November, 1854, and is now known as Main street in the village of Itasca.

The bill, as amended, alleges that complainant, Ernest C. Schroeder, is the lawful owner of the following described property, to-wit: Part of the north-east quarter of the south-west quarter of section 8, township 40, range 11, east of the third principal meridian, beginning at a stone at the north-west corner of the north-east quarter of the south-west quarter of section 8, township 40, north, range 11, east of the third principal meridian; thence south 87 degrees east 2.36 chains to the center of a road as laid out by H. Pierce, surveyor, November 21, 1854, and accepted by the commissioners of highways of the town of Addison February 20, 1855; thence south  $33\frac{1}{2}$  degrees east along the center of said highway 9.55 chains; thence south  $63\frac{1}{2}$  degrees west 3.27 chains; thence south  $14\frac{1}{2}$  degrees east 2.69 chains to the center of the Chicago and Elgin road; thence south  $72\frac{1}{2}$  degrees west in the center of said road 5.86 chains to the west line of said forty; thence north one degree east 13.55 chains along the said west line of said forty to the place of beginning, situated in the village of Itasca, DuPage county, Illinois; that he derived title to said premises from one Charles Pierce and wife on the fourth day of October, 1873; that he is now, and always has been since he first acquired title, in the quiet and peaceable occupation, possession and en-

joyment of the same; that said Pierce held title to the above described premises for many years prior to the date when said premises were conveyed to complainant, and that some time during the year 1854 said Pierce dedicated to the township of Addison, in DuPage county, a strip of land sixty-six feet wide, and adjoining the above described premises on the easterly line thereof, and commencing at a point in the center of Lester street, so called, thence north  $33\frac{1}{2}$  degrees west over the bridge across Meacham's creek 20 chains to a post, said strip of land being now known as Main street, in the village of Itasca; that the west line of said Main street of sixty-six feet, as dedicated by said Pierce, has constituted, adjoins and is the easterly line of complainant's property; that said line was marked by a fence, which was erected by said Pierce many years prior to the date when complainant acquired his title, in 1873, and that complainant has ever since that time maintained the said fences in good repair; that at the time when he took title to the said property said Pierce represented and told him that the fence along the easterly line of said premises constituted the westerly line of said road, (now Main street,) and that if such line as marked out by the erection of said fence by Pierce was not the correct line according to the description in the dedication of said street, even then the public has, by lapse of time and non-user, lost all rights to whatever property may be within complainant's enclosure; that he has maintained quiet and peaceable enjoyment of the above described premises, and has been in possession of the same from the date he received the title thereto, to the exclusion of all people, and that his lines, as established by his said fences enclosing said premises for the last forty years, were never questioned or disputed by any one; that on or about the 20th day of August, 1897, the trustees of the village of Itasca employed certain surveyors for the pretended purpose of locating said Main street, as dedicated by Pierce to the

township of Addison, in the year 1854; that said surveyors located the street ten or fifteen feet further west than where the said street has been located for the past forty years or more, and thereby encroaching to that extent upon complainant's property; that certain trustees of the village of Itasca and certain persons named as defendants are changing the road-bed so as to conform with said recent survey, and are removing the sidewalk on the easterly line of said Main street as established by the dedication of Pierce, and are re-building the same much nearer to complainant's property, and are about to enter upon complainant's property, and will remove his fences, plow up his field and cut standing trees, and permanently damage complainant's said lands; that certain members of the village board of Itasca have made threats that they will remove or cause the removal of the fence constituting the easterly line of the said property; that he planted a row of trees, forty or more in number, along the line of his property on the east, which have since grown up to large and magnificent trees, beautifying and greatly adding to the value of his property, and that if the proposed change of the street as contemplated and now in progress of being carried out is made, said trees will have to be cut down and removed, which will be a large and irreparable injury to complainant; that according to the old original lines of said street the property owners on the east side of Main street have encroached upon said street from six to twelve feet, and if said street is to be widened or changed the property owners on the east side of said street ought in equity and good conscience to be the ones to surrender said property to said village, and not an innocent person who has not encroached upon the public right nor intends to do so; that complainant's rights in the premises will be unduly prejudiced, and he will be subjected to great damages and loss, if the injunction is not issued immediately and without notice to the said defendants; prays for an injunction restraining



and enjoining defendants from changing the road-bed of said Main street and also from changing complainant's easterly line.

Defendants filed their answer, in which they deny that Charles Pierce dedicated, at any time, a strip of land to the township of Addison, which is now Main street, in the village of Itasca; aver that in 1854 the proper authorities of the said township laid out, in due form of law, a street in said village of Itasca, now known as Main street, and which said street lies east of certain premises of complainant; deny that the easterly line of complainant's premises was marked by a fence which was erected by said Pierce many years prior to the date when complainant acquired title, in 1873; deny that complainant has ever since maintained said fences in good repair, or otherwise; aver that complainant has, during the past twelve years, been encroaching upon the public highway known as Main street, which was duly laid out by the authorities of the township of Addison; that said road was laid out before the said village of Itasca was incorporated; that complainant has on several occasions within the past fifteen years moved his fences forward, in an easterly direction, a large number of feet upon said highway; admit they employed surveyors for the purpose of fixing the line of Main street, who found the fences of complainant ten or fifteen feet east of where they ought to be; deny they located the street ten or fifteen feet further west than where the road has been located for the past forty years; deny that by reason of non-user the public lost its right in the property; deny complainant is entitled to relief in a court of equity.

A cross-bill was filed by the village of Itasca and an answer by Ernest C. Schroeder. There was a replication to the answer to the cross-bill, and the cause was heard on pleadings and proof. The court, on the hearing, found the equities of the case to be with complainant, and dismissed the cross-bill for want of equity and entered a

decree making the injunction perpetual. To reverse this decree the defendants have appealed to this court.

J. H. BATTEN, and J. F. SNYDER, for appellant.

FRED A. RATHJE, and BOTSFORD, WAYNE & BOTSFORD, for appellee:

Equity, on a proper showing, will enjoin a threatened trespass. 1 High on Injunctions, (3d ed.) sec. 702, p. 542.

Where a city undertakes, under color of its charter powers, to take possession of land to which it has no right, on the pretense that it has been dedicated as a public street, thereby inflicting on the owner a permanent and continuing injury, the proper remedy is by injunction. *Mt. Carmel v. McClintock*, 155 Ill. 608; *Joliet v. Werner*, 166 id. 34.

A city may be restrained from encroaching upon the property of a private individual even under the pretense of preventing obstruction of a street. *Carter v. Chicago*, 57 Ill. 283.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It is first contended by appellant that the trial court erred in taking jurisdiction of the case,—that appellee had an adequate remedy at law. It is argued by appellant that equity will not enjoin a threatened trespass, and the case of *Goodell v. Lassen*, 69 Ill. 145, is cited in support of this doctrine. What was said in that case is still the doctrine held by this court, that “before a court of equity would lend its aid to enjoin a mere trespass, the facts and circumstances must be alleged in the bill, from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy.—*Livingston v. Livingston*, 6 Johns. Ch. 497.” The facts set out in the bill in the case at bar come clearly within the rule laid down by this court in that case. The allegation in substance is, that certain trustees of the village of Itasca, and certain per-

sons named as defendants, are changing the road-bed of Main street, and are about to enter upon complainant's property, and will remove his fences, plow up his field and cut his standing trees and permanently damage complainant's said lands; that certain members of the village of Itasca have made threats that they will remove or cause the removal of the fence constituting the easterly line of the said property; that he planted a row of trees, forty or more in number, along the line of his property on the east, and which have since grown up to large and magnificent trees, beautifying and greatly adding to the value of his property, and that if the proposed change of the street as contemplated and now in progress of being carried out is made, said trees will have to be cut down and removed, causing large and irreparable injury to complainant. In *City of Joliet v. Werner*, 166 Ill. 34, we said, quoting from *High on Injunctions* (p. 41): "When a municipal corporation threatens to remove plaintiff's fences as an alleged encroachment upon a street, plaintiff having for thirty years been in the undisturbed possession of the premises, the city having used no portion thereof for a street, and offering no compensation to the plaintiff, and no means of adjusting his compensation for the property to be taken, an appropriate case is presented for relief by injunction." (*High on Injunctions*, sec. 584.) A city may be restrained from encroaching upon the property of a private citizen, even under the pretense of preventing the obstruction of a street.—*High on Injunctions*, secs. 349, 1247, 1272, 1274; *Carter v. City of Chicago*, 57 Ill. 283; *City of Peoria v. Johnston*, 56 id. 45." See, also, *City of Mt. Carmel v. McClintock*, 155 Ill. 608, and *Comrs. of Highways v. Green*, 156 id. 504. These cases fully sustain the action of the trial court in issuing an injunction to prevent what the facts and circumstances set out in the bill show would be an irreparable injury.

*Second*—Error is assigned that the injunction was improperly issued without notice, because the oath to the

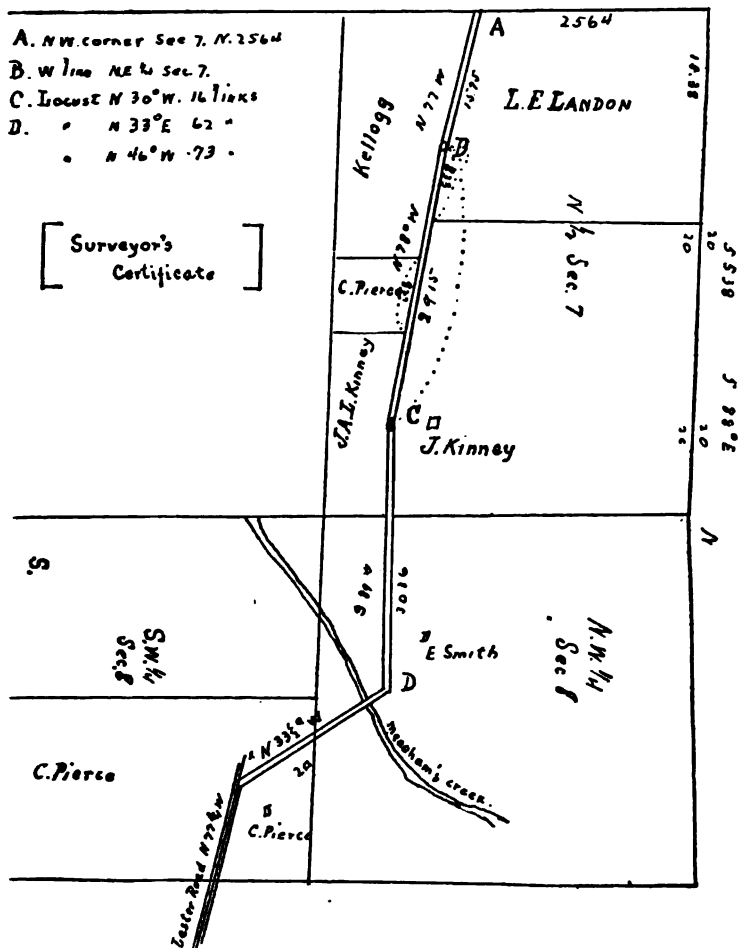
bill does not state how the rights of complainant will be prejudiced if the injunction is not issued immediately without notice. The statute provides: "No court, judge or master shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear from the bill or affidavit accompanying the same that the rights of complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice." (Rev. Stat. chap. 69, par. 3.) An examination of the bill shows the following averment or positive statement: "That the rights of your orator in the premises will be unduly prejudiced, and your orator will be subjected to great damages and loss, if the injunction in this case is not issued immediately and without notice to said defendants herein." The affidavit attached to the bill is not on information and belief, but Ernest C. Schroeder, the complainant, swears positively to the facts set up. It appears from the facts set up in the bill that the rights of the complainant will be unduly prejudiced, and the affidavit being positive, there was a sufficient compliance with the statute. In the authorities referred to by appellant the affidavits were upon "information and belief," and there was no averment in the bill that the complainant would be unduly prejudiced if the injunction was not issued immediately or without notice.

*Third*—The principal controversy in this case is in regard to the proper location of the road, now called Main street, as laid out by the highway commissioners of Addison township in 1854. This road runs on the east side of complainant's property, and the description in his deed running "to the center of the road," it becomes necessary, in order to correctly locate complainant's east line, to establish the center of this road. S. T. Armstrong, an engineer and surveyor, at the request of appellee made

a survey in 1897, for the purpose of locating this road and establishing the center line. W. S. Gamble, another surveyor, afterwards made a survey for the same purpose, and Armstrong was present, and Gamble testifies: "Armstrong's survey corresponded with my survey; there was no discrepancy between them."

The following is the description by which the road was originally laid out and platted by the highway commissioners across the lands of Charles Pierce, November 21, 1854: "Commencing in the center of the Lester road (so called) near the house of Charles Pierce; thence across Meacham's creek bridge near the house of Dr. E. Smith; thence westerly past and near the house of John Kinney to the town line, being the same route mentioned in the application, which survey is as follows, to-wit: Commencing at a post in the center of the Lester road (so called) near the house of Charles Pierce, on the east half of the south-west quarter of section 8, township 40, north, range 11, east; thence north  $33\frac{1}{2}$  degrees west over the bridge across Meacham's creek 20 chains to a post; a locust bears north 33 east distance 62 links; another locust bears north 46 west distance 72 links; thence south 89 west to a stake near the house of J. A. L. Kinney 30.36 chains; a locust bears north 30 west distance 16 links; thence north 78 degrees, west 29 chains 15 links to a stake on the west line of the north-east quarter of section 7, of said township; thence north 77 degrees west 15 chains 75 links to a post on the west line of the said town of Addison. The north-west corner of section 7 bears north distant 25 chains 64 links, passing over lands owned by the following named persons, to-wit: Charles Pierce, E. Smith, J. A. L. Kinney and Lewis E. Landon, Kellogg and the undersigned being of opinion that it is necessary and proper that such road be laid out. It is therefore ordered that a road four rods wide be laid out, and the same is located and laid out according to said survey, and the same is hereby declared to be a public highway."

The plat of the survey made by the highway commissioners laying the road is as follows:



The evidence shows that these surveyors took this original description and plat of the highway commissioners, made when the road was laid out in 1854, and re-surveyed the road from these notes, and found the center line of the road ran to the eastward of the center line, as claimed by appellant; that it laid nearer to the east side than it did to the west side. A large amount

of evidence was introduced on the hearing, but it will be impossible, within the limits of an opinion, to more than briefly refer to the material parts of the evidence.

Armstrong testifies: "We had with us this plat and description of the highway commissioners. We located the highway. We re-surveyed the road from these notes, and located the highway as indicated by the description on those two pages. The center line of the road, as laid down, did not go out so far west as we went on the ground. We commenced at the quarter section line between lots 1 and 2 of the north-west quarter of section 7, township 40, range 11 east, known as the center point of the road, and deflected that line from this across, as shown here, (indicating,) 78 degrees; followed that line down through to the intersection point as it deflects from these two lines, (indicating,) to the center line east. I mean the center line east and west of the road at that point. Here we deflected another angle equal to the distance between the bearing of the course, north 78 degrees south 89 degrees,—a difference of 3 degrees. That brought us down through the center line of the existing road at that point, and we chained to a point on this (indicating) north-westerly from the bridge. I verified this plat from my notes. I had it before me.

The court: "You say you chained down to a point north-westerly to this bridge?"

A. "It was at a point, as shown by this distance, 30 chains and 36 links from the previous deflection angle here (indicating.) Then we turned off a deflected angle equal to the difference between this course south 89 degrees west and north  $33\frac{1}{2}$  degrees west. We wanted to get this course north  $33\frac{1}{2}$  degrees west. We had to carry that point a little further ahead, (indicating,) so as to make this line pass down across the center of the old bridge as it stood there in an early day, across Meacham's creek, as we could locate it from the piles that stood there, that represented where the old bridge stood. We could tell

from these original piles standing there, that projected about one foot above the water. They are cut off. They are *farther east* than the existing bridge. It is west of those piles. We made this angle run across the *center* of that old bridge. We ran across the center of the old bridge, because the description says, '*over the bridge across Meacham's creek,*' and we could not think there was any other point than the central point. \* \* \* The *center* line of the road as laid by us ran over the *center point of the old bridge*. The center line of the bridge is the only point in a bridge. Assuming the point in the center of the bridge was correct, by following the course north  $33\frac{1}{2}$  degrees west 20 chains, we would be able to lay the center line of that road with all exactness. The center line, as we laid it, ran to the eastward of the center line as now laid. It laid nearer to the east side than it did to the west side. The plat is correct as to the survey."

Gamble also made a survey, and Armstrong was present. Gamble also used the original description and plat of the highway commissioners. He swears: "Armstrong's survey corresponded with my survey; there was no discrepancy between them." He then says: "When I made the survey I had a certified copy of the plat. \* \* \* I endeavored to find the starting point as recorded in the original plat in the center of the Lester road. I dug up the highway in two different places,—probably a rod square and a foot deep in the center of the Lester road. I found no evidences there. I proceeded then to the next known monument that is recorded in the original plat, which is the location of the highway bridge across Meacham's creek, as specified in the original plat. There were evidences of a former bridge,—four piles, two under the bridge and two outside. These piles were twelve feet, fronting east and west. After ascertaining these piles I located the center of the north two piles upon the top of the present bridge. The specification was across the bridge. I took the center, because where not spe-



cifically specified we always take the center. That is the universal custom in surveying and engineering. I then deflected the course south  $33\frac{1}{2}$  degrees east,—the course given in the original plat. I carried that line to the intersection of the Lester road. I then endeavored to find evidences of an original corner. I did not find any. I then produced a line northerly to the intersection of the highway that comes from the west. I commenced in the center of the Lester road and went northerly 20 chains. That line passed over the center of the bridge. I had then *located the center line as recorded in the original plat*. There is a fence on the west side of the road. That fence lies partly on each side of that west line of the road as I located it. It is shown on the map. \* \* \* The west line of the street as located by me cuts outside of the fence on the west side of the street as now used. In front of Schroeder's residence it crosses that line about opposite the south face of the factory building. \* \* \* I noticed some trees along the fence. They are just inside the fence line—the full length of that property frontage. From the factory north there were maple trees—fifteen or sixteen. They were from eight to ten or eleven inches in diameter. Also a large willow tree. There were some pine and evergreen trees in front of his residence. \* \* \* The center of the *present* bridge is eight feet *westerly* from the center of the old bridge as located by these old piles.”

These surveyors of appellee endeavored to find where the old mud bridge was located in 1854 across Meacham's creek, which was a monument established by the survey of the road in 1854. If they located accurately this old bridge across Meacham's creek, then, having the course given, “north  $33\frac{1}{2}$  degrees west,” it must follow that the center line of the road, now Main street, could be accurately laid. It appears that when the original survey was made there was an old mud bridge, built, as a witness says, by running two logs in and crossed like a mill-dam. This bridge was afterwards carried out by high

water, and a second—a pile bridge—was built. This pile bridge was located immediately on top of the old mud bridge. A third bridge—the present bridge—is now used to cross this creek, which the evidence shows is west of the old mud bridge. Jerome Lester testifies there have been three bridges across Meacham's creek; that the first one was a mud bridge, which was the one located there in 1854, when the highway commissioners laid out the road. The second one, he says, was a pile bridge, which was located immediately on top of the old mud bridge. He swears, as well as several other witnesses, that the piles of the second bridge are standing there now, and show that the pile bridge and the old mud bridge were located east of the present bridge from eight to ten feet. He says he remembers when the second bridge was put in; that he was attending school in Itasca and had to go and come by that bridge. D. L. Lester, a man seventy-nine years old, says he knows the road called Main street and had traveled it for fifty years; that he knew the old original bridge across Meacham's creek, and remembers when the pile bridge was put in; that there is a bridge there now; that the pile bridge was built right over the old mud bridge; that the present bridge is about ten or fifteen feet west of the old pile bridge; that he remembers when they were working on the pile bridge. J. A. L. Kinney, the same man whose name is mentioned in the old original plat of 1854, testified: "I went to Itasca in 1841. I built my house there in 1842. I am the same J. A. L. Kinney mentioned on that plat. I know Meacham's creek. I was assessor for about twenty years. I know the present bridge that is there. The first bridge I remember was a mud bridge; the second was a pile bridge. They built the pile bridge right where the old mud bridge was,—on top of the bridge, in the same place. The present bridge stands a little west of the pile bridge, from eight to ten feet or twelve." The only witness whose testimony conflicted with these wit-

nesses was Landon, a witness for appellant, who thought, from the best of his information, the old mud bridge was west of the present bridge.

The old mud bridge being a monument in the old survey, it was proper to establish it by extrinsic evidence. (*Choteau v. Jones*, 11 Ill. 300; *Chicago Dock and Canal Co. v. Kinzie*, 93 id. 415; *Smiley v. Fries*, 104 id. 416; *Kleiner v. Bowen*, 166 id. 537.) This testimony clearly establishes the location of this old mud bridge, and the old piles remaining from the pile bridge, which stood directly over the mud bridge, show that these surveyors located accurately the bridge and monument mentioned in the notes of the original survey made by the highway commissioners in 1854. From this monument in the survey they established the center line of Main street, which ran over the center point of this old bridge.

Appellant introduced in evidence a plat made by Prout, Herrick and Russell, the surveyors who were employed by the board of trustees of the village of Itasca, in 1897, to re-locate this road. These surveyors for appellant merely used the description in Schroeder's deed, which was the same as the deed from Charles Pierce to R. W. Gates. Herrick says: "I made my survey of Main street in accordance with Landon's survey, made in 1891. That was the data I followed. If Landon's minutes were incorrect then my survey was incorrect. I used Schroeder's deed to find the center of the street. Landon's minutes called for going down the center of Main street, and in following down the line as I have drawn it on that plat—the dotted straight line—it didn't appear to go down the center of any street. In that particular I thought them to be incorrect. I went north 32 degrees and 53 minutes, while in the highway commissioners' description of the original road that same course runs 33½ degrees west."

Landon, on whose survey Herrick relied, surveyed and drew the deed of the first survey of the Schroeder prop-

erty for R. W. Gates about November, 1866, when it was deeded to Gates by Charles Pierce. He says that he made the description from an actual survey, and that he did not have *any notes, maps, plats or records to guide him in the survey of Main street; that he had never seen the record at that time*, but had the general course of the road as it had been traveled; that in making the survey he always took the section line to tie to, and that he had been used, for twenty or thirty years, to see where the road was or should be, where it had been traveled,—the center track as then used. He then describes where he commenced at the north-west corner of north-east quarter of the south-west quarter, thence south 1.86 chains to the center of the road, now known as Main street, and then went south  $34\frac{1}{2}$  degrees east, following what, he says, “we term the center of the main traveled road to this point here (indicating on the plat) 9 chains and 55 links to the center of Main street and Schroeder’s south-east corner.” He says he located the center line of Main street across the creek in 1891 or 1892, when he and Chessman made the survey of the town; that he located the center line of Main street across the creek, *scarcely touching the bridge*; that it struck the south-east corner of the *present bridge*; that he thinks the old mud bridge, as nearly as he can judge, was in the traveled center line of Main street as it was first located, but his present recollection is that the mud bridge was farther west than the present structure three to six feet. The court said to the witness: “The question is whether or not you located the center of that street or simply located the land.” And he answered: “I located the land, and the east line of that land is the center line of Main street. I did not testify that I had seen the record at that time.” He said he never knew of his own knowledge of a post being at the point,—the center of the Lester road.

Russell says: “When I started to survey the Schroeder property I started from the point designated in his deed as the starting point,—the north-west corner of his prop-

erty,—then ran south 87 degrees east 1.86 chains. The spot I reached after running this 1.86 chains is a little circle in the red dotted line running northerly on the map. That red dotted line indicates the center of the highway, as near as I could arrive at it, in 1854. That point was about the center of the road as actually traveled. The next course I took was  $34\frac{1}{2}$  degrees east 9 chains and 55 links. That ran down the center of the road to the south-east corner of Schroeder's property. From thence I went south  $63\frac{1}{2}$  degrees west 2.84 chains to the post at the north-west corner of what is known as Pieper's orchard. Coming back to the place I started from, that point would be in the center of the road as actually traveled at the time I made the survey. From the stake in the north-west corner of Pieper's orchard I went south  $14\frac{1}{2}$  degrees east 2.69 chains to the corner of the Chicago and Elgin road. From there I went south  $72\frac{1}{2}$  degrees west 5.96 chains to the division line. I then ran north  $1\frac{1}{2}$  east along that division line 13.65 chains to the place of beginning." The witness says if he were to stand in the center of the bridge that at some time preceded the present bridge, and should with his instrument carry a line south  $33\frac{1}{2}$  degrees east, that line as extended would strike the Lester road, approximately, about twenty feet east from the stone from which he started. He says he verified the center of the road by finding the stone in the center of the Lester road by Charles Pierce's house. This stone was the stone Herrick caused to be set in 1891, when he says Prout dug down about six inches and they found a stake badly decayed,—so bad that it crumbled,—and that stone was then put there within probably ten minutes. Wischstadt and Pieper were there when they were surveying for the village of Itasca.

These surveyors, Herrick, Prout and Russell, seemed to have acted upon the assumption that Landon's original survey was correct. They located two points which appear to have been assumed by Landon,—one in the

center of the road as it then was, at Schroeder's north-east corner, and the other five to ten feet west of the center of the traveled road, at Schroeder's south-east corner, and as counsel for appellee very pertinently say, when these surveyors of appellant extended their center line through these points to the present bridge they find they are twelve to fifteen feet apart. Landon said his center line drawn through these points just touched the south-west corner of the present bridge. Herrick, Prout and Russell say that their center line drawn through these same points was from twelve to fifteen feet *west* of the present bridge. When they extended their center line through these points fixed by Landon, to the Lester road, they found a stake by digging in the center of the Lester road, but it was rotten, and could only be taken out in pieces. Wischsteadt, who was a witness for appellant and was present when the rotten stake was found, says: "We found a stake there about two inches in diameter and twelve inches long. \* \* \* I witnessed James when he drove *one there* about thirty years ago, but I can't swear that was the same stake." (James was county surveyor at that time, or had been one.) "The stake I spoke of being driven about thirty years ago by James was in about the same place where this stake was found. I stood right side of it when it was driven. It was nearly two feet long. It was a piece of an old rail or post. It was two inches thick." Serious doubt is thus thrown on this stake, when the witness describes a stake answering the description of the rotten stake found, and which, as he swears, he saw driven in about the same place more than a decade of years after the original location of the road by the highway commissioners.

This survey of appellant runs the west line of the street through the factory, blacksmith shop and within a very few feet of appellee's residence, and would necessitate the removal of the buildings, one of them built in 1866, and the cutting down of trees planted nearly

twenty-five years ago. Appellant contends that appellee's fence was moved out, from time to time, from where it was originally. Appellee, Schroeder, denies this, and swears that when he purchased the property of Charles Pierce, Pierce pointed out the post at the north-west corner, and said: "That is your line" (pointing to the black line indicating the fence, on the plat.) "I mean the black line on the east—on the east of my place, at the north end. I mean the fence line." He is sure that when he bought the place the fence was on the west side of the street, and the east side of his land was there; that the fence there now is in just the same place where the rail fence used to be; that the blacksmith shop he put there in 1873; that he did not build it up to the line of the street, but about eight feet from the west line, but cannot tell how far the buildings stand from the road or fence; that he set out trees all along *inside* this east rail fence—about twenty inches from the fence; that he planted them in 1878, and they are now from five to twelve inches in diameter. Robert W. Gates, who owned the premises in controversy before appellee, and who purchased the premises from the original owner, Pierce, says he ran a cheese factory; that he built this factory in January or February, 1867; that when he built it, it stood about seven feet back from the fence and west of the road; that he went there last summer to see how the fence that is there compared as to being on the same line as the fence when he owned the property. He says: "The factory is still there. The house is there, and I set out some cherry trees in front of the house. They are the same as when I lived there. When I lived on the Schroeder property there was a house and factory and a little barn back of here. This post-and-rail fence stood there, and here was the willow hedge (referring to plat). \* \* \*

In my judgment the fence is within six inches. It may vary a little, but I should say it stood exactly where the fence stood when I owned the property. \* \* \* There

was something said to me when I placed the factory where I did, by Mr. Pierce. I asked him where the line was. I wanted to place my factory so as to have the platform in front and not get it onto the street. He told me where the line was. That fence was the line, so I placed my factory there." Four other witnesses corroborate this testimony. Samuels, who lived on the Pierce farm in 1864, says there was then a fence on the east side of appellee's land and the west side of the present road. He says: "A year ago I noticed the fence along the west side of the street. So far as I can see it stands in the same place as the fence stood when I lived there in 1864 and 1865. It stands about the same distance from the dwelling house. There was a willow hedge when I lived there. There was a rail fence and a hedge inside." Three other witnesses substantiate this testimony. The survey by the surveyors for appellee is thus confirmed by this testimony. Gamble testifies: "There is a fence on the west side of the road. That fence lies partly on each side of that west line of the road as I located it,"—showing there has been no substantial change in the line of fence in over forty years.

Appellant introduced seven or eight witnesses on this question, between whom and appellee's witnesses the testimony is conflicting. Some had known the property, and claimed the maple trees stood east of the fence three or four feet, and that appellee's fence stands east of where the old rail fence stood, from four to six or eight feet. Two of the witnesses for appellee had lived upon the land and knew the location of this fence, and corroborate appellee, who had lived there so many years, and are less likely to be mistaken than persons who saw it in merely passing along the road. Some of defendant's witnesses were defendants in the case or members of the village board of Itasca, or interested in property across the road east from appellee, who might be affected by the result of the suit. What this court said in *Greenwood v.*



*Fenn*, 136 Ill. 146, is applicable in this case, viz.: "The testimony of the complainant and of defendant *Fenn*, as well as that of most of the other witnesses, was given orally in court, and the court having thus had an opportunity to see and hear the witnesses was in a much better position to judge of their relative credibility than we can be; with only the record of their testimony before us." We are not prepared to say the finding of the court on these disputed facts was against the preponderance of the evidence. The finding of the chancellor on conflicting evidence stands substantially on the same ground as the verdict of a jury. The error in finding as to facts must be clear and palpable to authorize a reversal. *Coari v. Olsen*, 91 Ill. 273; *Patterson v. Scott*, 37 Ill. App. 520; *Voss v. Venn*, 132 Ill. 14.

None of the witnesses of appellant dispute, or attempt to dispute, the location of the blacksmith shop and factory, as originally located, with reference to the fence, and they stand in the same location as when built. The factory was built in 1866 by Gates, and he placed it seven feet back of the fence, west of the road, and he says the fence is in the same place now. Gamble, the surveyor, says he measured the distance between the east line of the factory building and the fence line in front of the same, and it is seven feet, thus corroborating Gates that the fence is in the same place as in 1866.

A careful examination of the evidence contained in the record, including the plats and maps, convinces us that the surveys of Armstrong and Gamble correctly located the center of the road as originally laid by the highway commissioners from the original notes and plat made in 1854, and that the description in the Schroeder deed, made several years after the road was laid, used by Herrick and Russell, was not the best evidence of the location of the road.

*Fourth*—A municipal corporation, by its acts or acquiescence, may be equitably estopped by reason of its acts.

Appellee swears he went into possession of the premises in question under his deed from Pierce over twenty-five years ago. There was a fence on the west side of the then existing road and on the east side of his premises as now occupied, which fence, though replaced several times, stands now on the same line as it did when he first took possession, in 1873. The factory building still stands, and has stood since 1867, in the identical place, within seven feet of the fence on the west side of the road. He erected his blacksmith shop within about six feet of the fence. He planted, in 1878, along the inside of the fence, about forty maple trees, which are now from five to twelve inches in diameter, and planted in his front yard shrubbery and ornamental trees. Appellant claims by its survey and plat that one-half of this factory, a portion of the blacksmith shop, a tenement house, and the maple trees and shrubbery, are within the lines of the street and should be removed. Appellee swears that from the time he purchased the property and made all these improvements no person, or official of the township or village of Itasca, has made any objection until the resolution passed by the village council of Itasca in 1897; that the public authorities have worked the existing road and graded it down, about six feet from either fence, about two feet; that the authorities have recognized the existing road as the true road, by graveling, plowing and scraping the same at various times. By these acts, and recognizing the present location of this road, and by their silence and acquiescence, the public authorities are estopped from locating the street further west than where it has been the past forty years.

The circumstances of this case bring it within the case of *City of Joliet v. Werner*, 166 Ill. 34, where we said (p. 40): "Where a party lays off lots on his own ground, which are marked by stakes or other visible monuments, and conveys with reference to such boundaries, the grantee will take the same according to the line as actually

run and established, although the grantor may have been mistaken as to the correct location of the line. \* \* \*

We are, moreover, of the opinion that the city is equitably estopped from tearing up the present sidewalk and erecting it farther north, by reason of its acts of recognition of the present location of the sidewalk, as such acts have been above described. Its construction of a sidewalk upon the line of the present sidewalk, its acceptance of the sidewalk already constructed by appellee, the building by it of a culvert up to the present line of the sidewalk, the graveling by it of the street along the present line of the sidewalk, and its levy of an assessment for the purpose of paying the cost of building the walk as at present located, are such positive acts as work an estoppel. While it cannot be maintained that, as respects public rights, municipal corporations are within ordinary limitation statutes, yet the principle of *estoppel in pais* may be applied to such acts by a municipal corporation as have been above designated. In applying the principle of an *estoppel in pais* the courts are left to decide the question, not by the mere lapse of time, but by all the circumstances of the case, and to hold the public estopped or not, as right and justice may require,"—citing *Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25; *City of Peoria v. Johnston*, 56 id. 45; *City of Mt. Carmel v. McClintock*, 155 id. 608; *Martel v. City of East St. Louis*, 94 id. 67.

In *Lee v. Town of Mound Station*, 118 Ill. 304, we said (p. 317): "It is true that we have held that where the public have long withheld the assertion of control over streets, and private parties have been, by the acts of those representing the public, induced to believe the streets abandoned by the public, and on the faith of that belief and with the acquiescence of those representing the public they have placed themselves, by making structures or improvements in the streets, in a situation where they must suffer great pecuniary loss if those represent-

ing the public be allowed afterwards to allege that the street was not abandoned, the doctrine of equitable estoppel may be applied." *Dickerson v. City of Leroy*, 72 Ill. App. 588; *Village of Winnetka v. Prouty*, 107 Ill. 218; *City of Decatur v. Niedermeyer*, 168 id. 68.

Finally, it is urged that the court erred in ordering execution to issue against appellant for costs. It is true, an execution cannot be awarded against a municipal corporation. In the case at bar execution was properly ordered as to defendants Wischsteadt, Pieper and Pfluger.

We are of the opinion that the decree of the court below dismissing the cross-bill of the village of Itasca, and granting a perpetual injunction against defendants from interfering with the real estate of complainant lying immediately west and adjoining the road, or from in any manner interfering with or disturbing the fence or any of the trees or buildings situated near the same, was proper. The error in ordering execution against the village of Itasca will be corrected by an order entered in this court directing the circuit court to amend its record in that respect. The decree of the circuit court in all other respects will be affirmed.

*Decree affirmed.*

## THE CITY OF STREATOR

v.

EMILY CHRISMAN.

*Opinion filed October 19, 1899.*

1. MUNICIPAL CORPORATIONS—*knowledge of defective walk by injured party does not necessarily bar recovery.* A recovery for a personal injury sustained upon a defective sidewalk by one who was in the exercise of ordinary and reasonable care is not necessarily defeated because of his knowledge that the walk was out of repair.

2. NEGLIGENCE—*whether party exercised due care in using sidewalk is a question of fact.* Whether due care was exercised in using a sidewalk by one who knew it to be out of repair is a question of fact.

*City of Streator v. Chrisman*, 82 Ill. App. 24, affirmed.

182	215
98a	1280

182	215
108a	1 97

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

CHARLES H. EGBERT, for appellant.

H. H. DICUS, and McDUGALL & CHAPMAN, for appellee.

Per CURIAM: In deciding this case the Appellate Court delivered the following opinion:

"Appellee, while walking along a street of the city of Streator towards her home, about ten o'clock at night, on August 7, 1897, was tripped by a loose board in a sidewalk, which was stepped upon by a companion with whom she was walking, and thrown down, receiving injuries to her back, shoulder and hand, for which she sued the city and recovered a verdict for \$1000. A judgment was entered by the court for that amount, and the city appealed therefrom to this court.

"It was shown by the evidence, and is not questioned, that the boards in the sidewalk were loose at the time and place in question, and that appellee, by reason of such defect in the walk, received a fall and suffered certain injuries. It was contended, however, that the defect had not existed for such a length of time, nor was it of such a nature, as to charge notice thereof upon the city, and most of the evidence in the case was introduced upon that question. Four witnesses, including appellee, swore positively that they passed over the walk frequently, and that the boards were loose for from two to four weeks prior to the accident. On the other hand, some eight witnesses introduced on the part of appellant testified that they had used the walk often during said time and never noticed any loose boards, and one other witness for appellant said he noticed the loose boards on the day

of the accident, but not before. None of them, however, would swear positively there were no loose boards before that time, though the section foreman who had charge of the railroad crossing at the place where the accident occurred, testified that he examined the walk in question a week before the accident and could then discover no loose boards. While the evidence is not conclusive, we think it sufficient to justify the jury in finding that the defect had existed for a sufficient length of time, and was of such a nature, that the city could, in the exercise of reasonable diligence, have ascertained the existence of the defect and repaired it.

"It is contended that appellee knew of the defect in the walk, and was therefore guilty of contributory negligence in going upon it. Although a person passing along a sidewalk may know it is out of repair, he may, notwithstanding such knowledge, recover for a personal injury occasioned by the defective walk if he uses ordinary and reasonable care. (*City of Flora v. Naney*, 136 Ill. 45.) Whether due care was exercised in using a sidewalk knowing it to be out of repair is a question of fact for the jury. *Village of Cullom v. Justice*, 161 Ill. 372.

"The instructions given on both sides fairly presented the law governing the case to the jury. We cannot say that their verdict was clearly unwarranted by the evidence, and we are therefore not disposed to disturb it.

"We would have been better satisfied had the damages been assessed by the jury at a smaller amount, but they are not sufficiently large to warrant a reversal on that account alone, and the judgment of the court below will be affirmed."

We concur in the foregoing views expressed by the Appellate Court and in the conclusion reached by it. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## THE JOHN SPRY LUMBER COMPANY

v.

MICHAEL DUGGAN.

*Opinion filed October 19, 1899.*

1. FELLOW-SERVANTS—*when relation of fellow-servants does not exist.* A workman hired and paid by an independent contractor, contemporaneously engaged in unloading lumber from a vessel, is not necessarily and as a matter of law a fellow-servant of yardmen employed by a lumber company to pile the lumber.

2. MASTER AND SERVANT—*falling of a lumber pile not an ordinary hazard.* The danger of a pile of lumber falling is not one of the risks assumed by an employee who necessarily passes by it, since the hazard is not ordinarily incident to the business.

3. SAME—*when injured party is not a mere licensee.* An employee of an independent contractor engaged by a lumber company to unload a vessel is not a mere licensee, but the company is bound to exercise reasonable care for his safety while upon the premises.

4. NEW TRIAL—*what not ground for a new trial.* That a piece of paper found in the jury room had twelve different amounts written upon it is insufficient to impeach the verdict on the ground that it represented the average of the several amounts voted by the jurors as damages, when the verdict as rendered and the average of the sums on the paper are widely apart.

*John Spry Lumber Co. v. Duggan*, 80 Ill. App. 394, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. HENRY B. WILLIS, Judge, presiding.

Appellant was engaged in the lumber business, and was unloading a boat-load of lumber upon a dock which it owned and controlled. Two sets or gangs of men were employed in unloading the cargo, one set passing the lumber out from the vessel and the other set receiving the lumber and piling it upon the dock. There is no dispute but that the set of men engaged upon the dock in receiving and piling the lumber were the yardmen in the regular employ of appellant. There is some dispute as to whether the set of men engaged in the work on the

boat of passing the lumber out to the yardmen on the dock were in the employ of appellant or one Hunt. There was evidence tending to show that Hunt was an independent contractor, who had taken, by contract with appellant, the job of furnishing men to do the unloading on the boat at a fixed sum. Appellant had upon its dock a water-closet, which was for the use of the men engaged in the work there. Appellee was one of the set of men on the boat passing the lumber out to appellant's yardmen. He undertook to go from the boat to the water-closet, and in so doing followed the route from the boat to the water-closet which, from the evidence, would appear to have been the most direct of any safe route. While on his way, in passing one of the piles of lumber placed by the yardmen, the pile of lumber fell upon him and injured him. In this suit to recover damages for such injury he was awarded a verdict for \$1000, upon which judgment was entered. That judgment has been affirmed by the Appellate Court.

A. B. MELVILLE, and F. J. CANTY, for appellant.

JOHN S. HUMMER, and D. G. RAMSAY, (JOHN REID McFEE, of counsel,) for appellee.

Per CURIAM: In deciding the case the Appellate Court delivered the following opinion:

"The only question presented is as to the sufficiency of the evidence to sustain the verdict. No complaint is made of any ruling in matters of procedure. The instructions to the jury are not questioned, nor is it claimed that the verdict is excessive.

"It cannot be contended that from the evidence appellee can be held to have been guilty of any negligence on his part. It is clear, from the evidence, that the course which he pursued in attempting to reach the closet was the only direct route which could be pursued by him and be safe. To have taken a different course, as



suggested by some of the witnesses, would have brought him in the way of the men who were handling the lumber and would have exposed him to apparent danger. Had he taken such course and been injured by the moving lumber he would doubtless have been held to have been so far negligent in courting an apparent danger as to preclude any right to recover therefor.

"There being no question as to the care exercised by appellee for his own safety, we have to consider if negligence of appellant has been established as to the proximate cause of the injury.

"There is no conflict in the evidence as to the cause of the injury, and it may be said to be undisputed that it resulted from carelessness on the part of the yardmen in forming the pile of lumber in question. The only defense interposed by appellant is, in effect, that it is not answerable to appellee for such carelessness, and that the same cannot be imputed to it as negligence in relation to appellee. In support of the contention in this behalf, counsel for appellant argue, first, that appellee was an employee of appellant and was injured by the negligence of a fellow-servant; second, that appellee was an employee of appellant and was injured through a risk which was an assumed hazard; and third, that if appellee was an employee of Hunt and not of appellant, then he was, in relation to appellant, a mere licensee, and there existed no duty on the part of appellant toward him by disregard of which a charge of negligence and a right of action could here arise.

"The application of the doctrine of negligence of a fellow-servant, here contended for, must depend upon a showing, in the first place, that appellant was the common master or employer of appellee and the yardmen through whose carelessness he was injured. But the evidence warranted the jury in finding that appellee was not an employee of appellant at all, but the employee of Hunt, an independent contractor, and the jury so found,

both by general and special verdict. Upon that finding there can be no application of a fellow-servant's negligence. Appellee testified that he was in the employ of Hunt. Four of the men who were engaged with appellee in the work on the boat, and whose employment was identical with that of appellee, testified that they were in the employ of Hunt. Hunt, who was called as a witness for appellant, testified: 'My business is vessel unloading. \* \* \* I had charge of unloading the boat. I had the job to look after and unload the boat. I took the job in the spring to unload the boat, and get men for her every time she came, and unloaded her. \* \* \* The boat paid \$117.60. That was equally divided between twenty-eight men. I worked with the men on the boat. I counted among the twenty-eight. Mr. Spry engaged me and sent me word when the boat would come in and to get a gang of men to unload it, and I brought men there to unload the boat when it came.' Mr. Spry, called on behalf of appellant, testified: 'Martin Hunt would come up in the spring and say, 'Mr. Spry, can I unload your boat?' And I would say, 'Martin, what will you do?' And he would say: 'I want \$4.20. I want ten cents for the water boy, ten cents for each man and \$4 for each man.' Q. 'He wanted that for the season?' A. 'Yes, they took them for the season.'

"It was undisputed that appellant paid Hunt for the entire work and that appellee and the other workmen received their pay from Hunt. The finding of the jury that appellee was in the employ of Hunt, an independent contractor, and not in the employ of appellant, disposes of the contention. But if it were conceded that appellant was the common master or employer of both the yardmen and appellee, it would not, of necessity, follow that the doctrine contended for applied. It is apparent from the evidence that the relation between the men working on the boat and the yardmen working on the dock was not such as to make their duties 'bring them

into habitual association so that they may exercise a mutual influence upon each other promotive of proper caution.' (*North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57; *Chicago and Alton Railroad Co. v. Swan*, 70 Ill. App. 331, affirmed in 176 Ill. 424.) The two sets of men had no relationship to each other, except that the ones upon the dock received the lumber from the ones upon the boat. Appellee and the others upon the boat had nothing whatever to do with the piling of the lumber, nor did their work bring them in contact with that part of the yardmen's work. Appellee's association with the yardmen was that of a day only, and it ended with the passing of the lumber over the rail of the vessel. We think that the jury would have been warranted in finding that they were not fellow-servants had there been proof of a common employer.

"Nor can the contention that the danger of the pile of lumber falling was an assumed hazard be maintained. If appellee had been an employee of appellant, it could not be said, from the evidence presented, that he had assumed the risk. It appears conclusively that such a danger was not ordinarily incident to the business, and that in fact it had never before occurred in the experience at that yard. Neither could it be said that appellee, with knowledge of the danger, continued in his employment.

"Finally, counsel for appellant contend that if appellee was an employee of Hunt, the appellant owed him no duty in the matter of keeping the surroundings upon the dock reasonably safe. In other words, it is argued that he was a mere licensee upon the premises of appellant. To this we cannot assent. Appellee was not a mere licensee, enjoying a license subject to its attendant perils. He was not upon the premises merely for his own convenience and pleasure. On the contrary, there was a relationship between him and appellant, arising from the contract between appellant and his employer, Hunt. The class of cases, many of which are cited, wherein one

visiting premises for his own pleasure or convenience is held to accept all perils accompanying the license, do not apply here. When appellant, for the purposes of his own business, contracted with Hunt to bring appellee and others to unload its vessel, it thereby not only invited, but contracted for, the presence of appellee, and became obligated to exercise reasonable care for his safety while upon his premises. (*Samuelson v. Cleveland*, 49 Mich. 164; *Drennan v. Grady*, 167 Mass. 415; *Evansville v. Griffin*, 100 Ind. 221; *Powers v. Harlow*, 53 Mich. 507; *Welch v. McAllister*, 15 Mo. App. 492; *Bennett v. Railroad Co.* 102 U. S. 577; *Indermauer v. Dawes*, 1 L. R. C. P. 274; *Heaven v. Pender*, 11 L. R. Q. B. Div. 503.) The jury could not have properly found, from the evidence, that the appellee was merely a licensee.

"Upon the motion for a new trial it was sought to impeach the verdict by showing that it had been reached by adding together the several amounts voted as damages by the several jurors and then taking the average of such amount. The showing in that regard was wholly insufficient to establish the fact. It consisted only in finding in the jury room a piece of paper upon which was some unimportant writing by the foreman, and upon which there were twelve different sums noted, the average of which was noted as \$12,762. Whether the figures were used for the purpose claimed was matter of suspicion only, unsupported by anything which amounted to proof, and it is clear that the process alleged to have been used did not result in arriving at the amount for which the verdict here was rendered,—viz., \$1000. The court properly disregarded the showing made in this behalf in overruling motion for new trial.

"The judgment is affirmed."

We concur in the views above expressed by the Appellate Court, and in the conclusion reached by that court as above announced. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

THOMAS B. SHOAFF

v.

HENRY S. FUNK.

*Opinion filed October 19, 1899.*

APPEALS AND ERRORS—*failure to argue a question is a waiver.* The Appellate Court need only consider such assignments of error as were not waived and are argued in the brief for appellant.

CARTWRIGHT, C. J., dissenting.

*Shoaff v. Funk*, 73 Ill. App. 550, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. F. BOOKWALTER, Judge, presiding.

SALMANS & DRAPER, and TILTON & CUNDIFF, for appellant.

PENWELL & LINDLEY, for appellee.

Per CURIAM: In deciding this case the Appellate Court delivered the following opinion:

"Appellee brought this suit in the circuit court of Vermilion county against appellant, charging him with slander. The slanderous charges were, that on April 1, 1897, appellant said of and concerning appellee, that 'he (appellee) was a damned thief and he (appellant) could prove it, and he (appellant) would have him (appellee) in the penitentiary.' 'You (appellee) are a damned thief.' 'You (appellee) are a damned thief and I (appellant) can prove it.' 'You (appellee) are a thief and ought to be in the penitentiary.' 'You (appellee) are a damned thief and I (appellant) can prove it, and I (appellant) will get you (appellee) in the penitentiary.' 'You (appellee) are a thief.'

"Appellant pleaded the general issue, which put in issue all the material facts alleged by appellee in his

declaration. There was in the court below a trial by jury, and a verdict returned for appellee for \$2500. Appellant then moved for a new trial, assigning numerous errors, calling in question various rulings of the trial court on the admission and exclusion of evidence, the giving and refusing of instructions, and complaining that the verdict was contrary to the evidence and the damages excessive.

"The bill of exceptions in this cause contains the following: 'Upon the argument of the defendant for a new trial of said cause the lawyer for the defendant stated to the court that the defendant had filed in this cause the usual grounds for a new trial, but that he had no criticism to make or fault to find with the rulings of the court in the admission or exclusion of evidence nor in the giving or refusing of instructions; that he only relied on two grounds for a new trial,—that is to say, that the evidence did not warrant the finding of the jury for the plaintiff, and that the damages were excessive. Therefore the court, passing upon the motion for a new trial, only considered the two propositions argued by counsel for the defendant, and afterwards, on, to-wit, the sixth day of August, A. D. 1897, it being of the regular days of said term of said court, in passing upon said defendant's motion for a new trial of said cause the court held that the damages were excessive, and that unless a *remittitur* was entered by the plaintiff for \$1250 a new trial would be granted. Thereupon counsel for plaintiff entered a *remittitur* of \$1250, and the court thereupon overruled the said motion of defendant for a new trial of said cause and entered up judgment in favor of the plaintiff and against the defendant for \$1250 and costs of suit, to which action of the court in overruling said motion of defendant for a new trial of said cause and in refusing to grant the same and entering judgment in favor of the plaintiff and against the defendant for \$1250 and costs of suit, counsel for defendant then and there duly excepted.'

"Appellant, by appeal, brings said cause to this court and assigns numerous errors on the record, but by reason of the waiver by his lawyer, in the court below, of the consideration of all the errors that may have intervened in the trial of this case in that court, except that the verdict was contrary to the evidence and the damages were excessive, as shown by the bill of exceptions in the record herein, as above quoted, we are called upon to consider only such errors as were not waived and are assigned in this court and argued in the brief of counsel for appellant. And these are two. The first is, that the verdict and judgment are against the evidence; and the second is, the judgment as rendered is for an amount of damages that are excessive.

"We have carefully read all the evidence in this record, and after duly considering the same find there was a conflict in the evidence, and, as we know, the jury and the trial judge, who saw the witnesses and observed their manner when testifying, were better enabled to determine aright where the truth lay than we are, and as they have found for appellee we will not reverse their finding in that regard. As to the damages being excessive when reduced to \$1250, as they were by the action of the trial court, we have concluded that that amount is not so excessive as to justify us in reversing this judgment on that account, hence we affirm it."

We concur in the views expressed in the foregoing opinion of the Appellate Court and in the conclusion reached by that court. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. CHIEF JUSTICE CARTWRIGHT, dissenting.

EDWARD HARLAND

v.

HARRY W. HARPOLD.

*Opinion filed October 16, 1899—Rehearing denied December 7, 1899.*

1. APPEALS AND ERRORS—*chancellor's findings supported by evidence will stand.* Findings of the court clearly supported by the evidence will be sustained on appeal.

2. CONTRACTS—*when contract is not merged in conveyances executed in pursuance thereof.* The delivery and acceptance of deeds and the execution of mortgages in pursuance of a written agreement for the exchange of real estate do not extinguish the agreement and merge it in the deeds unless such is the intention of the parties.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY B. WILLIS, Judge, presiding.

GILBERT & RIPLEY, for appellant.

WARREN B. WILSON, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

October 16, 1896, an agreement in writing, under seal, was entered into between Florence M. Harpold, party of the first part, and Edward Harland, of the second part, for the exchange of certain real estate properties within thirty days after date, time being made the essence of the contract. After the expiration of the thirty days deeds passed, by which appellant conveyed all but four of the lots by the agreement to be conveyed on his part, and Florence M. Harpold procured to be conveyed to appellant the property she was required to convey, and the parties entered into possession of their respective properties. Afterwards, for a valuable consideration, Florence M. Harpold assigned all her interest in the contract which had not been surrendered up or canceled, but which had, after the passing of the deeds, been filed for record, to appellee, who filed his bill, seeking a specific perform-



ance of so much of the contract as remained unperformed by appellant, by compelling him to convey the remaining four lots to him. Appellant filed a cross-bill, asking to have the original contract delivered up and canceled. On a hearing on original and cross-bills, and answers thereto, the prayer of the original bill was granted and the cross-bill was dismissed, and this appeal is prosecuted.

It was admitted on the hearing that there was an error in the description of the lots to be conveyed by appellant; also that a modification was made in the terms of the contract, whereby a change was made in the terms of certain mortgages which Florence Harpold executed on the lots conveyed to her by appellant, and it appeared that thereafter, and before the hearing, a release had been obtained of one of the mortgages, she re-conveying certain of the lots so conveyed to her by appellant.

Appellant contends that certain defects existed in the title to the property which Florence Harpold was to convey to him, and also there was some defect in the sewerage, and that accordingly, by mutual agreement and with a full understanding between him and her, the original agreement was modified in accordance therewith, and in consideration of the defects in the title to the property to be conveyed to him it was agreed that the four lots in question should be left out of the conveyance from him; that the other changes relating to the encumbrances were also thereupon made, and that all these changes were made in pursuance of an amicable adjustment of the questions that had arisen and as a full execution of the contract as modified by mutual consent. The agreement recites that both parties have seen the respective properties and are satisfied with the same. Appellee contended, on the other hand, that there was no defect in the title to the property to be conveyed by Florence Harpold; that she did all things required of her to be done and performed; that she furnished an abstract within the time limited by the terms of the agreement; that

the supposed defect in the title was only as to a building line, and that this was an advantage, rather than otherwise, to the property, and that appellant's objection on account thereof, and his refusal to convey the four lots in question, were because he thought he was being worsted in the trade, and that neither Florence Harpold, nor any one for her, ever consented or agreed to accept less property than that called for in the agreement, and always insisted that she would hold appellant to his agreement and to the conveyance of the four lots.

On the trial all witnesses were examined in open court before the chancellor, and the decree finds that the court has jurisdiction of the parties and the subject matter; that the equities are with the complainant; that the material averments of the bill are true; that the material averments of defendant's answer, except those concurring with the averments of the bill, are not true; that on the 16th of October, 1896, appellant, Edward Harland, and Florence M. Harpold entered into a contract set out in bill; that instead of using language appearing in said contract, describing said lots to be conveyed by appellant, the following language was intended to be employed: "Lots 11, 12, 13, 14, 15, 16, 17, 18, 24, 25, 26, 27, 28 and 29, all in Harland's subdivision of the west half of block 32, in canal trustees' subdivision of the east half of section 31, township 39, north, range 14, east of the third principal meridian;" that prior to the beginning of this suit appellant had conveyed to Florence M. Harpold all the property in said contract described, except lots 17, 18, 28 and 29, etc.; that Florence M. Harpold sold and assigned to appellee her right in and to said four lots and in and to said contract, and by proper deeds had conveyed same and all her right therein to appellee; that said four lots described were of the value of \$3000; that Florence M. Harpold performed all the stipulations in said contract on her part; that she delivered to Harland proper abstracts of title to the property agreed by her

to be conveyed, with deeds of conveyance from the owner thereof, and delivered possession to appellant; that appellant has refused and still refuses to convey to appellee, or to Florence M. Harpold, said four lots, to-wit, 17, 18, 28 and 29, etc.; that by mutual consent of the parties the \$2000 which in said contract Florence M. Harpold was to borrow on lots 24, 26 and 27 was borrowed on the following: 24, 25, 26 and 27, and by mutual consent said Florence M. Harpold, instead of executing to appellant two mortgages of \$1000 each on lots 24, 26 and 27, and one on lots 25, 28 and 29, did execute one note for \$2000 to appellee, dated December 15, 1896, due one year thereafter, which said last named note for \$2000 was secured by mortgage on lots 24, 25, 26 and 27, and said note was on December 13, 1897, canceled by conveyance by said Florence M. Harpold of the property described in said mortgage, in consideration of the cancellation and satisfaction of said mortgage, at the request of said defendant, said note and mortgage were by said defendant duly canceled and satisfied.

It was ordered, adjudged and decreed that the contract in the bill between Florence M. Harpold and appellant be reformed by striking out the following words: Lots 11, 12, 13, 14, 15, 16, 17 and 18, in block 32, in Harland's subdivision, etc.; also lots 24, 25, 26, 27, 28 and 29, in the same block above described, where they occur in said contract, and insert the following words: Lots 11, 12, 13, 14, 15, 16, 17, 18; also lots 24, 25, 26, 27, 28 and 29, all in Harland's subdivision of the west half of block 32, in canal trustees' subdivision, etc., which said last named words were intended by the parties to be inserted in said contract, and that said contract as reformed by the decree be specifically performed; that within twenty days from the entry of this decree appellant shall, by a good and sufficient deed of general warranty, convey to appellee, Harry W. Harpold, the following described real estate: Lots 17, 18, 28 and 29, all in Harland's subdivision of

the west half of block 32, in canal trustees' subdivision, etc.; that in the event appellant shall not, within ten days from the entry of this decree, execute his deed conveying said four lots, then George Mills Rogers, master in chancery, is authorized, on the application of appellee, to execute to appellee a deed conveying said four lots; that the said four lots, when so conveyed to appellee, together with the remaining property in said contract described as property to be conveyed by appellant, are conveyed to appellee in exchange for the following described realty: Lot 30, in King & Rumsey's subdivision of Woodlawn Ridge, section 23, township 38, north, range 14, east of the third principal meridian; that appellee shall have liberty to apply to the court for further orders in execution of this decree; that appellee recover of appellant costs in this suit to be taxed, and that appellant be dismissed for want of equity.

We have carefully examined not only the abstract but the record, and we find it clear the evidence supports the findings of the court.

Appellant contends that the delivery and acceptance of the deeds extinguished the prior executory agreement; that by the acceptance of the deeds and the execution of the mortgages the written contract was thereby extinguished and is merged in the deeds. There is no doubt that this is ordinarily so; still, it is wholly a question of intention. The evidence is cumulative and convincing that, however appellant may have intended the transaction, Florence M. Harpold or her agent never consented or did anything by which appellant was given to understand that she released him from the entire obligation of his contract, unless, indeed, it might be said that the giving and accepting of the deeds in question might be so construed. It is a significant fact that at the time the deeds passed, the original contract was not delivered up and canceled. The appellant received all that his contract called for, and appellee showing that the contract

had been performed on his part, the burden of proof was on appellant to show some sufficient equitable grounds why he should not be required to perform his part of the undertaking, or that the agreement had in fact been canceled, abrogated or annulled. A careful examination of the record fails to show that he has done so.

The decree of the circuit court is affirmed.

*Decree affirmed.*

## THE CITY OF SPRING VALLEY

v.

THOMAS GAVIN.

*Opinion filed October 19, 1899.*

1. NEGLIGENCE—*street in constant use may be presumed to be safe for travel.* One traveling upon a street in constant use by the public has the right to presume, and to act upon the presumption in the absence of knowledge of its dangerous condition, that it is reasonably safe for ordinary travel throughout its width.

2. SAME—*no more than ordinary care to avoid accident is necessary on part of plaintiff.* An instruction for the defendant, in an action for negligence, is faulty which states that under the specified circumstances the plaintiff was required to use "more than ordinary care" to avoid accident, since ordinary care commensurate with the danger is all that the law requires.

3. INSTRUCTIONS—*when an instruction as to disregarding testimony is properly refused.* An instruction that the jury may disregard the entire uncorroborated testimony of a specified witness if they believe he has willfully sworn falsely is properly refused, when covered by an instruction given in almost identical language, except that it applies to all the witnesses in the case.

4. TRIAL—*right of counsel to continue cross-examination to entrap witness.* The right of counsel to continue a cross-examination without definite purpose except to entrap a witness, if possible, rests largely within the discretion of the court.

*City of Spring Valley v. Gavin*, 81 Ill. App. 456, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Bureau county; the Hon. H. M. TRIMBLE, Judge, presiding.

This was an action on the case by appellee, to recover for damages alleged to have been received by him on the night of September 25, 1897, through the negligence of appellant in leaving open and unprotected a ditch in one of its streets, some five feet deep and three feet wide. The ditch had been dug by appellant for the purpose of laying down its water mains, and on the first night after it was open a light had been placed at the end as a danger signal to the public, but on the night in question there was no signal hung out whatever. Appellee alleges that while passing along the street in a buggy, at the time and place in question, with one James Dunn, in the exercise of all due care and caution for his own safety, the horse attached to the buggy fell into the ditch and appellee and his companion were thrown into the said ditch; that appellee, by reason of said fall, received serious injuries to his sides, back and spine, which are permanent in their nature. The jury found for appellee and assessed his damages at \$1500, and judgment was entered for that amount, and it has been affirmed by the Appellate Court.

CHARLES W. KNAPP, City Attorney, ALFRED R. GREENWOOD, and J. L. MURPHY, for appellant.

HASKINS, PANNECK & HASKINS, for appellee.

Per CURIAM: In deciding the case the Appellate Court said:

"Instruction No. 22 given for appellee is said to be erroneous, because it states the law to be, that persons traveling upon the streets of a city which are in constant use by the public have the right to presume, and to act upon the presumption, that such streets are reasonably safe for ordinary travel throughout their entire width. In the case of *City of East Dubuque v. Burhyte*, 173 Ill. 553, where a similar instruction was under consideration, the following language is used: 'The substance of this charge

to the jury was, that if they believed, from the evidence, that plaintiff went upon the sidewalk in question and traveled over the same, and was exercising ordinary care for her own safety in so doing, she had a right to presume that said sidewalk was reasonably safe. We find no evidence in the record that plaintiff knew, or had reason to believe, that the walk was unsafe or dangerous. Under such circumstances, in the absence of all knowledge on her part that the walk was defective, we cannot say the charge to the jury was erroneous. Had the evidence shown that the plaintiff, when she went upon the walk, knew its defects and dangerous condition, a different question would be presented.' What is said in the above case applies with equal force to the case under consideration. Had there been any evidence to show that appellee was aware of the condition of the street the instruction would have been improper, but we have not been able to discover such evidence in this record, and therefore, under the rule above announced, the instruction was not erroneous.

"The refusal of the trial court to give instructions 3 and 14 offered by appellant is also assigned as error. Instruction No. 3 is as follows:

"If the jury believe, from the evidence, that the place where the accident in question occurred was necessarily more dangerous, under all the circumstances of the case, as shown by the evidence, than the ordinary streets and sidewalks, and that by the exercise of ordinary care and prudence this condition of things could have been known by the plaintiff, or was known to him, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and if he failed to do so, and thereby contributed to the injury, he cannot recover in this suit, and your verdict should be for the defendant.'

"This instruction is faulty, in that it tells the jury that under certain circumstances appellee was required to use more than ordinary care and caution. This is not the

law. It is true that the care required of a person under circumstances where great danger exists, is, if the same is known to him or could become known by the exercise of ordinary care and prudence, greater than that required where the danger is very slight. But in either case, the care required of him is only the ordinary care to avoid danger commensurate with the peril to which he is exposed. The law is well settled in this State, that where an injury is not willful a party cannot recover for the injury received, unless it appears, from the evidence, that he exercised ordinary care. But in no event is he required to use more than ordinary care and caution to avoid accident. The instruction was therefore incorrect and properly refused.

"Instruction No. 14 would have told the jury, if given, that if they believed, from the evidence, that the appellee, Thomas Gavin, had willfully sworn falsely, on the trial, as to any matter or thing material to the issues in the case, then they were at liberty to disregard his entire testimony, except in so far as it had been corroborated by other credible evidence or by facts and circumstances proved on the trial. There was no error in refusing this instruction, even if it were in itself entirely free from criticism, for the reason that it was fully covered by instruction No. 5 given for appellant, which used the identical language, except that it was applied to all the witnesses in the case.

"Appellant assigned, by leave of court, as an additional error, that the court erred in interrupting and interfering with the cross-examination of James Dunn, the companion of appellee at the time of the accident, who was being examined at length as to his route to and from Peru and Marquette, and the actions of himself and appellee on the day of and prior to the accident. The court allowed a reasonable examination on the subject, and requested counsel for appellant to declare his purpose in pursuing the investigation further, which counsel refused



to do. So far as it now appears from appellant's argument in this court, the investigation was only an experiment, without definite purpose except to entrap the witness, if possible. Proper practice requires that such a line of examination should be rarely, if ever, permitted; but this matter is largely within the discretion of the court, and in this case the examination was very properly limited on the lines sought to be pursued.

"While the damages allowed in this case are rather large, yet it appears from the evidence that the appellee was at the time of the accident thirty-three years of age, and a strong, healthy man; that he was confined to his bed some five weeks by reason of the accident; that up to the time of the trial, which occurred about a year later, he had not been able to do work or attend to his business, and was still suffering pain from the injury. There was also some evidence to the effect that the injury would be permanent. It is beyond question that appellee was injured at the time and place alleged, and it satisfactorily appears that he was then and there in the exercise of ordinary care and prudence. It further appears that the appellant had left a dangerous excavation in its streets without any protection or warning to the public, and that such negligence on the part of the appellant was the cause of the injuries to the appellee. Under the evidence the jury properly found a verdict for appellee, and we cannot say that, under all the circumstances, they were not warranted in finding a verdict for the amount named by them. The judgment of the court below will therefore be affirmed."

We concur in the foregoing views expressed by the Appellate Court, and in the conclusion reached by it. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

FRANK ATKINS

v.

THE LACKAWANNA TRANSPORTATION COMPANY.

*Opinion filed October 16, 1899.*

1. CARRIERS—owner of vessel owes reasonable care to person on board with his permission. The owner of a vessel engaged in carrying merchandise owes the duty of exercising reasonable care for the safety of one coming on board at a stopping place, with his knowledge and permission, to supply drinking water to laborers on the boat, who hired him for the purpose.

2. SAME—when owner of vessel is not liable for injuries to a person on board with his permission. One on board a vessel, with the owner's permission, to supply drinking water to employees, who hired him for that purpose, cannot hold the owner liable for injuries received in jumping to the dock after the vessel had started, even though no warning of its movement was given, where such act was voluntarily undertaken, in the belief that it was safe.

*Atkins v. Lackawanna Transportation Co.* 79 Ill. App. 19, affirmed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding.

CHURCH, McMURDY & SHERMAN, for plaintiff in error.

D. J. & D. J. SCHUYLER, Jr., for defendant in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Plaintiff in error sued defendant in error in the superior court of Cook county for damages resulting from an injury received by him in jumping from one of defendant's boats to a dock, in the city of Chicago. A demurrer was sustained to the amended declaration and plaintiff elected to stand by it, whereupon judgment was rendered against him for costs. That judgment was affirmed in the Appellate Court for the First District, and plaintiff now prosecutes this writ of error.

The amended declaration alleges, in substance, that on the 15th day of June, 1891, the defendant, a corporation, was a common carrier of merchandise on the great lakes, operating a line of steamships thereon; that on that day one of the steamers, the "Florida," having about 2000 tons of coal aboard, had arrived at and was moored to Hedstrom's dock, in Chicago,—a wharf on the Chicago river,—and about twenty men were employed, at the instance of defendant, in unloading the coal; that plaintiff, a resident of Chicago and a minor, (seventeen years of age,) was then and there lawfully on this vessel, "with the knowledge and permission of defendant," for the purpose of supplying the men with drinking water, being employed by them for that purpose; that it was the duty of the defendant to give warning of the removal of the vessel from the dock, and to provide and maintain a means of passing from the vessel for a reasonable time after the work of unloading was finished; that when the work of unloading was finished and plaintiff was then and there preparing forthwith to leave the vessel by means of a gang-plank provided and maintained by defendant, the defendant, knowing the premises and without notice to plaintiff, and before he had a reasonable opportunity to leave the vessel, wrongfully and negligently withdrew the plank, so that plaintiff had no safe means of leaving the vessel, and forthwith began to cast off the ropes by which the vessel was moored to the dock and to move the vessel away from the dock, and plaintiff desiring to leave the vessel, "and being moved and impelled by the sudden exigency," and "believing at the time that he might safely do so," jumped to the dock and thereby sustained injuries, etc.

It is contended by counsel for plaintiff in error that the defendant in error owed to him, while on its vessel, the same degree of care that a carrier owes to passengers,—that is, the highest degree of care. Counsel for defendant in error, on the other hand, contend that the

plaintiff was on the vessel as a licensee merely, and defendant in error was liable only for a failure to observe ordinary care for his safety. The rule relied upon by counsel for plaintiff in error, which seems to be supported by the general trend of decisions, is stated in Wood on Railway Law, (vol. 3, Minor's ed. 1894, pp. 1627, 1628,) as follows: "Where the company expressly or impliedly invites a person on its premises, it is liable to him for injuries resulting either from defective condition of premises or improper management of trains. \* \* \* Any one who is there on business comes under the head of persons invited there." The law is generally settled that express messengers and mail clerks fall within the above rule, as do others who are employed to go upon the company's premises to transact the business of their employer in connection with the carriage of merchandise or passengers and who are not in its employ.

We think the allegations of the declaration are sufficient to bring plaintiff within the rule thus announced, the defendant bearing such a relation to him as that it was required to exercise reasonable care for his safety. (*Spry Lumber Co. v. Duggan*, ante, p. 218.) Certainly there are no grounds for the contention that the relation of passenger and carrier existed between the parties so as to impose upon the defendant the highest degree of care.

On the theory that the defendant was bound to exercise ordinary care to prevent injury to the plaintiff there can be no doubt that the declaration fails to state a case, and we concur in the following views and conclusion expressed in the opinion of the Appellate Court by HORTON, J.:

"Assume, as we must, the correctness of every material allegation contained in the declaration, still no cause of action is shown. The declaration says that the plaintiff, 'believing at the time that he might safely do so, did then and there jump from said vessel onto said dock, and thereby then and there sustained severe bodily injuries.'

This shows that the plaintiff had time to consider the situation and to exercise his judgment. He thought that he could jump to the dock without injury. As the declaration says, he was 'thereby' injured,—that is, he was injured by jumping from the vessel to the dock. That was a voluntary act on his part. This injury was wholly caused by his own deliberate act. He says that he thought he could do it safely. The result shows that he erred in judgment or that he was careless. In neither case does he establish any basis upon which to hold the defendant liable for the consequences. If the injury was the result of his own carelessness, of course it will not be contended that defendant is liable. If it was the result of his own voluntary act, through an error in judgment on his part, then the defendant is not liable.

"To meet this barrier to success, it is stated in the declaration that plaintiff, 'being moved and impelled by the sudden exigency' and believing that he might safely do so, jumped to the dock. The allegations of fact do not warrant or sustain this deduction. As a general rule, the act which results in personal injury, but which in law is justifiable, is where there is some imminent danger, real or apparent. We are not aware of any cases holding that a party may recover damages for an injury caused by his own voluntary act when there was no imminent, or apparently imminent, danger, and no specially exciting or exasperating circumstances. In the case at bar there was no apparent or probable danger to plaintiff if he had remained on the vessel. There were no specially exciting circumstances. There was nothing which should so disconcert him as to prevent or control the reasonable exercise of his judgment. He was not 'impelled' by any 'sudden exigency,' such as would justify his jumping to the wharf, 'believing at the time that he might safely do so,' and then charging the unexpected and injurious consequences to the owner of the vessel."

*Judgment affirmed.*

THE PEOPLE *ex rel.* John Maloney

v.

ROBERT LINDBLOM *et al.*

*Opinion filed October 19, 1899—Rehearing denied December 6, 1899.*

1. CERTIORARI—*certification of civil service commissioners cannot be set aside by certiorari.* A certification of a person by the civil service commission cannot be set aside and another person placed in his stead by the common law writ of *certiorari*.

2. SAME—*certiorari does not lie to determine correctness of civil service commissioners' selection.* The correctness of a ruling by a civil service commission that one person is entitled to be certified in preference to another cannot be reviewed on *certiorari*, even on the ground that the statute on which such ruling is based is unconstitutional, but the inquiry is limited to determining whether the commission had jurisdiction and proceeded according to law.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

This was a petition for a common law writ of *certiorari*, brought in the name of the People, on the relation of John Maloney, against Robert Lindblom, Edward Carroll and John W. Ludwig, civil service commissioners. In the petition it was averred that the petitioner is a citizen of the State of Illinois, a resident, property owner and taxpayer of the city of Chicago, county of Cook and State of Illinois, and a native of the city of Chicago, in which he has lived continuously since his birth, forty-three years ago; that on the 29th day of March, 1898, the civil service commission of the city of Chicago gave public notice, pursuant to law, that on June 8, 1898, an examination would be held by said commission for the position of superintendent of the meter department mechanical, the same being a position in the classified civil service of said city; that in accordance with said notice the petitioner on May 11, 1898, filed with the chief examiner and secretary of said commission his application for examination for said position, which was approved by said

commission, and that on due notice the petitioner was afterwards subjected to the physical, medical and mental examination prescribed by the said civil service commission for the said position, which he passed with a general average of 89.48, and his name was thereupon placed upon the register of eligibles for said position, at the head of the list; that one Aaron L. Brown was also at the same time examined for said position, and passed the examination with a general average of 76.65; that one Richard J. Lavery also passed said examination with a general average of 76.28, and that said Brown and said Lavery names were also placed upon said list of eligibles, with the aforesaid averages, respectively; that such examination was the first held for said position by said commission; that afterwards, on the 4th day of October, 1898, it having become necessary to fill said position of superintendent of meter department mechanical, the said commission did certify to the commissioner of public works of said city the name and address of the said Aaron L. Brown; that the said certification of Aaron L. Brown was made by the commission under and pursuant to the amendment to the act to regulate the civil service of cities, approved March 20, 1895, known as section 10½ of the said Civil Service law. The petitioner avers that the said law is unconstitutional and void, and that the said civil service commission should have certified, pursuant to said Civil Service law and rules thereunder, the name of the said John Maloney, petitioner, for the said position. The prayer of the petition is that said amendment to the said law may be declared unconstitutional and void, and that a writ of *certiorari* may be issued to bring up the record of the proceedings before the civil service commission, and that the certification of the said Aaron L. Brown may be rescinded and revoked, and that the name of the petitioner, John Maloney, may be certified by said commission to the commissioner of public works in lieu of the name of Aaron L. Brown.

In return to the writ served on the civil service commissioners they filed a record of the proceedings sought to be reviewed, from which it appears that an examination was had for the position of superintendent of meter department mechanical on June 1, 1898. The record, among other things, shows the following:

"*Eligible List*, No. 294.—Superintendent meter mech. dep't, held June 1, 1898; posted September 30, 1898.

9870—Maloney, John, 145 N. Ashland ave. .... 89.48

21190—Brown, Aaron L., (ex-soldier) 1500 Newport ave. ... 76.65

19693—Lavery, Richard J., 176 36th place. .... 76.28

"Certificate of discharge of Aaron L. Brown from the military service of the United States.

"*To all whom it may concern*—Know ye that A. L. Brown, a private of Capt. W. I. Coles' company C, 71st regiment of the N. Y. State militia, who was enrolled on the twentieth day of April, one thousand eight hundred and sixty-one, to serve. ...., is hereby discharged from the service of the United States, this eleventh day of June, 1861, at Washington, by reason of sickness. (No objection to his being re-enlisted is known to exist.) Said A. L. Brown was born in Brooklyn in the State of New York, is twenty years of age, five feet nine inches high, light complexion, brown eyes, brown hair, and by occupation, when enrolled, a clerk.

"Given at Washington this 11th day of June, 1861.

"*NOTE*—This sentence will be erased should there be anything in the conduct or physical condition of the soldier rendering him unfit for the army.

HENRY P. MARTIN,

*Lt. Col. Com. 71st Reg. N. Y. S. M.*"

Upon which are endorsed the following words and figures:

"I have paid this day the herein named A. L. Brown the amount of pay and allowance due him on his final statement.

CARY M. FRY, *Paymaster U. S. A.*"

It further appears from the record returned, that under section 10½ of the Civil Service act of 1897 the civil service commissioners certified Aaron L. Brown to H. O. Nourse and the superintendent of public works for appointment, he being entitled to preference as he was an ex-soldier and had been honorably discharged from the service of the United States. On the hearing the court quashed the writ, and the petitioner appealed.



PETER J. ELLERT, and THOMAS L. HARTIGAN, for appellant.

JOHN C. BLACK, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It will be observed upon an examination of the prayer of the petition that the petitioner asks that the certification of Aaron L. Brown may be rescinded and revoked, and that the name of the petitioner, John Maloney, may be certified by the commission to the commissioner of public works in lieu of the name of Aaron L. Brown. It is apparent from the prayer of the petitioner that the scope and purpose of a common law writ of *certiorari* are misconceived by him. This is not a proceeding in which the certification of Brown by the civil service commission can be set aside by the court, and the petitioner, John Maloney, placed in his stead, nor is it a contest in which the right of one of the parties to the place in question may be set aside and the other sustained. The only office of the writ of *certiorari* is to bring before the court the record of the proceedings of the inferior tribunal for inspection, and the only judgment to be rendered is that the writ be quashed or that the record of the proceedings be quashed. *Chicago and Rock Island Railroad Co. v. Fell*, 22 Ill. 333.

The petitioner seems to be laboring under another misconception in regard to his rights and the power of the court in a proceeding of this character. The inferior tribunal, where the record is brought before the court by writ of *certiorari*, may have erred in its rulings on questions of law during the progress of the trial, or it may have erred in the application of the law to the facts in reaching its final judgment, and yet those errors cannot be reviewed and corrected in a proceeding of this character. On a return to a writ bringing the record before the court the only proper inquiry is whether the inferior

tribunal had jurisdiction and proceeded legally,—*i. e.*, followed the form of proceedings legally applicable in such cases,—and not whether it correctly decided the questions arising upon the admission or exclusion of evidence, the giving and refusing of instructions, and other like questions, during the progress of the trial. The rulings of a court may be erroneous and yet it may have jurisdiction and proceed legally. (*Hamilton v. Town of Harwood*, 113 Ill. 154.) The rule announced in the case cited has been fully sustained by other cases. (*Donahue v. County of Will*, 100 Ill. 94; *Scates v. Chicago and Northwestern Railway Co.* 104 id. 93.) Here the jurisdiction of the civil service commission is not disputed, and it is apparent that the tribunal proceeded according to the forms of law applicable in such cases.

But it is said that the civil service commission made an erroneous decision in holding that Aaron L. Brown, who was engaged in the military service of the United States in 1861 and who had been honorably discharged, was entitled to preference under section 10½ of the act of 1897, as the section of the act was unconstitutional. It may be true that the civil service commission erred in its ruling on the hearing, but that is a question which cannot be inquired into by writ of *certiorari*. The civil service commission had jurisdiction and it proceeded according to the forms of law, and if that tribunal made a mistake in holding that the act of the legislature was valid, and the facts presented brought Aaron L. Brown within the terms of the act which entitled him to a preference over the petitioner, the ruling of the tribunal was mere error, which cannot be reviewed in this proceeding.

We think the judgment of the court quashing the writ was correct, and it will be affirmed.

*Judgment affirmed.*

## THE WEST CHICAGO PARK COMMISSIONERS

v.

## METROPOLITAN WEST SIDE ELEVATED RAILROAD CO.

*Opinion filed October 13, 1899—Rehearing denied December 7, 1899.*

1. APPEALS AND ERRORS—*when remarks of judge cannot be assigned as error.* Remarks made by the judge in announcing his decision in a special assessment case, and which it is urged show that he entertained erroneous views as to the legal principles applicable to the cause, cannot be assigned as error when written propositions were not presented to be held as the law of the case.

2. SAME—*court's finding of fact on matter resting in opinion of witnesses not lightly disturbed.* The findings of fact by the trial court will not be disturbed, as against the weight of evidence, when based on conflicting testimony concerning a matter resting in the mere opinion of the witnesses.

3. PARKS—a new assessment cannot reach property which has already paid as much as its benefits. An application for the confirmation of a new special assessment levied under section 20 of the Park act of 1895, (Laws of 1895, p. 289,) to defray the cost of an improvement a former assessment for which has been held void, is properly denied where it appears that the property has not been benefited in a greater amount than that paid under the previous assessment.

APPEAL from the County Court of Cook county; the Hon. W. T. HODSON, Judge, presiding.

FRANCIS A. RIDDLE, and H. S. MECARTNEY, for appellants.

GARDNER & BURNS, (W. W. GURLEY, of counsel,) for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was an application by the appellant commissioners for the confirmation of a new special assessment levied to defray the cost of the improvement of Douglas boulevard, in the city of Chicago, a former assessment for that purpose having been held void. The improvement was completed under the former assessment, and

this was a proceeding under section 20 of the act approved June 24, 1895, (Hurd's Stat. 1897, par. 159, chap. 105,) to levy and collect a new assessment on the property benefited. It appeared from the assessment roll that the sum of \$7 per foot had been levied upon the property and collected under the previous assessment. The legal objections were determined by the court adversely to appellee. The objections that the property would not be benefited to the amount newly assessed thereon, and that it is assessed more than its proportionate share of the cost of the improvement, were, by agreement of the parties, submitted to the court for decision, a jury being waived. No exception was preserved to the ruling of the court as to the admissibility of evidence. No propositions were submitted to be held as the law in the case.

Three witnesses were sworn on behalf of the objector on the question of benefits, all of whom testified that, considering the use to which the lots were devoted, the property was not benefited by the improvement. Two of them testified that, considering every purpose to which the property might be devoted, it was not benefited more than \$6 or \$7 per front foot,—the sum that had already been paid under the former assessment. Two witnesses produced by appellants testified on the question of benefits. One of them expressed the opinion the property had been benefited to the amount of \$25 a front foot, and the other that the value of the property had been increased by the improvement to the amount of \$40 to \$50 per front foot. The court found for the objector. In announcing this conclusion the court expressed, orally, opinions upon questions of law and fact involved. Counsel for the appellants argue it appears from such expressions the court entertained erroneous views as to legal principles applicable to the cause, and upon such insistence urge a reversal of the judgment. If counsel feared the court entertained erroneous views as to legal principles in-

volved, written propositions should have been presented to be held as the law of the case, as is provided by paragraph 42 of the Practice act. The rulings of the court on such propositions could have been preserved for review in this court, but an assignment as for error cannot be based on the remarks made by the judge in announcing his decision. (*Fitch v. Johnson*, 104 Ill. 111; *Chicago, Burlington and Quincy Railroad Co. v. City of Ottawa*, 165 id. 207.) In the absence of rulings on such propositions we are to assume the court entertained correct views as to the law.

The only question open for our consideration is whether the judgment is so manifestly against the weight of the evidence that we should hold the court erred in its findings of fact. Two witnesses were of opinion the property had not been benefited more than \$6 or \$7 per front foot and two others thought the benefits had been greater. The trial court saw the witnesses and heard them testify. The inquiry was as to a matter resting in the mere opinions of witnesses. The appearance of the witnesses, their manner and deportment and their apparent intelligence, capacity and judgment, were important factors in weighing their evidence and giving value to the opinions expressed by them, respectively. There is no reason we should declare the trial judge should have accepted the testimony of any of these witnesses in preference to that of any other of them.

Section 21 of the act approved June 24, 1895, under which the proceeding is maintained, provides it shall be the duty of the commissioners to credit on the new assessment roll the payments that had been made under the previous assessment. It appeared from the assessment roll filed herein that about \$7 per front foot had been paid under the former assessment proceeding for benefits accruing from this improvement. The conclusion reached by the trial court is consistent with the view it appeared from the evidence the property had not

been benefited more than the amount that had already been collected from it. That being true, the application for the assessment of an additional sum was properly denied.

The judgment is affirmed.

*Judgment affirmed.*

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DANIEL W. MILLS *et al.*

v.

THE CITY OF CHICAGO.

*Opinion filed October 19, 1899.*

This case is controlled by the decision in *Holden v. City of Chicago*, 172 Ill. 263.

WRIT OF ERROR to the County Court of Cook county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

GEORGE W. WILBUR, for plaintiffs in error.

CHARLES S. THORNTON, Corporation Counsel, and JOHN A. MAY, for defendant in error.

Per CURIAM: This is a writ of error to reverse a judgment of the county court of Cook county confirming a special assessment. The ordinance providing for the improvement fails to state the height of the curb required to be constructed on each side of the street, and, on account of this defect, it is claimed that the ordinance is invalid. The ordinance involved, as respects the height of the curb, is substantially like the ordinance which was held to be invalid in *Holden v. City of Chicago*, 172 Ill. 263, and the decision in that case controls the decision of this case.

Accordingly, as to the property set out and described in the assignment of errors in the record, the judgment of confirmation is reversed and the cause is remanded to the county court.

*Reversed and remanded.*

THOMAS F. FARRELL *et al.*

v.

THE WEST CHICAGO PARK COMMISSIONERS.

*Opinion filed October 13, 1899—Rehearing denied December 7, 1899.*

1. APPEALS AND ERRORS—*when appeal will not be dismissed.* A motion to dismiss an appeal on account of the insufficiency of the appeal bond will be denied when not made until after the parties have submitted their controversy to the court, there being no motion to set aside the order under which the case was taken.

2. EVIDENCE—*when the contents of property owners' petition cannot be shown by parol.* Oral testimony as to the contents of the petition of the property owners consenting to a public improvement is inadmissible in a proceeding to confirm a special assessment, when the absence of the petition itself is not accounted for.

3. SAME—*cost of portion of improvement abutting on particular property cannot be shown at confirmation.* In a proceeding to confirm a special assessment testimony showing the cost of that portion of the improvement upon which the property of some of the objectors abutted is inadmissible, since the different pieces of property must share proportionately the cost of the improvement as a whole.

4. SPECIAL ASSESSMENTS—*one cannot urge objections in no way prejudicial to him.* An objection to the validity of a special assessment that the original ordinance limited the assessment to contiguous property while the new ordinance provides for an assessment upon all property benefited, cannot be raised by the owner of land contiguous to the improvement, since he is not prejudiced thereby.

5. SAME—*what not a premature adoption of ordinance for second assessment.* A new ordinance levying an assessment for a public improvement completed under a prior ordinance declared void on appeal is not prematurely adopted, although after its passage and pending confirmation proceedings parties to the original proceeding, which had been stricken from the docket of the county court, caused it to be reinstated for the purpose of filing the remanding orders of the Supreme Court therein.

6. SAME—*when new trial will not be granted for newly discovered evidence.* A new trial will not be granted on the ground of newly discovered evidence in a proceeding to confirm a special assessment, where the testimony relied on is contained in the ordinance, plans, specifications and estimates, and the alleged changes in the manner of the construction of the improvement were apparent and might have been known by the exercise of slight diligence.

7. The other objections raised by appellants are discussed and determined in *Cummings v. West Chicago Park Comrs.* 181 Ill. 136.

APPEAL from the County Court of Cook county; the Hon. W. T. HODSON, Judge, presiding.

GEORGE W. WILBUR, for appellants.

FRANCIS A. RIDDLE, and H. S. MECARTNEY, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

In *Culver v. People ex rel.* 161 Ill. 89, the ordinance of the corporate authorities of the town of West Chicago providing for the improvement of Douglas boulevard, adopted March 28, 1893, at the request of the West Chicago Park Commissioners, was declared to be void. The improvement contemplated by said void ordinance having been completed by the commissioners thereunder, said commissioners, on the fourteenth day of July, 1896, in pursuance of the provisions of section 20 of the act in force July 1, 1895, entitled "An act to enable park authorities to make local improvements," etc., adopted an ordinance providing that the cost of making the said improvement should be paid for by special assessments upon the property benefited thereby. This is an appeal from a judgment of the county court confirming a special assessment under the said ordinance upon certain property of the appellants.

The appellants, who are very numerous, appeared and complied with all the rules of this court, and the cause being ready for decision on their part, it was submitted and taken by the court for determination, after which a motion was made by appellees to dismiss the appeal as to all of the appellants except Michael Kelter, on account of the insufficiency of the appeal bond. Upon the rendition of the judgment in the county court an appeal was allowed to the appellants, severally, on filing a bond in the sum of \$250, with surety to be approved by the clerk of the circuit court. A bond was given by Michael Kelter alone, as principal, and Judson D. Sherman as surety.



It purports to be in behalf of all the other appellants as well as Kelter, and the condition is for the prosecution of the appeal by each of the appellants, and it was approved in accordance with the order allowing the appeal. The bond was insufficient, and if objection had been made in apt time a rule would have been entered requiring a good bond, but the appeal could not have been dismissed without an opportunity to file such bond. Section 69 of the Practice act forbids the dismissal of an appeal by reason of any informality or insufficiency of the appeal bond, if the party taking the appeal shall, within a reasonable time to be fixed by the court, file a good and sufficient bond to be approved by the court. When the motion was made the appellants had submitted their controversy to the court, and it could not be entertained without setting aside the order by which the case was taken. There was no motion to set aside that order, and the motion to dismiss must be denied.

The contention of appellants that no proof was made as to the cost of the entire improvement is not tenable. We find the assessment roll was introduced in evidence and that the total cost of the improvement was therein clearly shown. This disposes of a number of alleged errors based upon this contention.

The judgment here appealed from is the same one which was before this court in *Cummings v. West Chicago Park Comrs.* 181 Ill. 136. Appellants' assignment as for error that it was not proven the owners of a majority of the land fronting on the proposed improvement had petitioned or consented that the improvement should be made is the same as was presented by the appellants in the *Cummings case*. The alleged error was found groundless in that case, and upon the authority of that holding the same ruling is made in this. The discussion of and reasoning upon the point need not be repeated.

The court properly declined to receive oral testimony as to the contents of the petition of the consenting prop-

erty holders, for the reason the petition itself was the better evidence and its absence was not accounted for.

The validity of the assessment generally is questioned because the original ordinance limited the assessment to contiguous property, while the new ordinance provides for an assessment upon all property benefited. If that objection would be available it would only be to an owner whose property was not included in the terms of the original ordinance, and counsel has not made it appear that any of the appellants' property is so situated. If the property of appellants is contiguous to the improvement they could not be prejudiced by a new assessment roll covering a larger district, by which other property owners are made to contribute to the expense.

The opinion and judgment of this court in the *Culver case*, declaring the original ordinance to be void, were rendered and entered in this court on the twenty-eighth day of March, 1896. The appellee commissioners accepted such decision and judgment as final, and on the fourteenth day of July, 1896, in an ordinance adopted on that day, (being the ordinance here involved,) declared the provisions of the said original ordinance had failed by reason of such decision of this court, and ordained that a new special assessment on property benefited should be levied and assessed under the provisions of said section 20 of the said act in force July 1, 1895, which provides for such proceedings in the event a prior ordinance has been declared void. Previous to the passage of such last mentioned ordinance this court, in certain writs of error prosecuted by the appellant Farrell and others to obtain a reversal of the judgment of confirmation against them under the prior void ordinance, declared (*Farrell v. Town of West Chicago*, 162 Ill. 280,) such prior ordinance void on the authority of the *Culver case*. After the ordinance of the appellee commissioners here involved had been adopted, and while proceedings were pending in the county court for confirmation of assessments under it,

the plaintiffs in error in the *Farrell case* caused the original proceeding under the void ordinance, which had been removed from the docket of the county court, to be reinstated in that court for the purpose of filing the remanding orders of this court in the *Farrell case*. It is now objected that the new ordinance to levy the assessment here under consideration is invalid for the reason it was adopted before the proceedings under the prior ordinance had been concluded, and that for the same alleged reason this proceeding under said last ordinance is premature and cannot be maintained. The point is not well taken. Prior to the adoption of this last ordinance this court had declared the prior ordinance to be void, and the proceedings thereunder in the county court had been, in some way not fully disclosed in the record, stricken from the docket of the county court. Such action was proper to have been taken as a consequence of the decision in the *Culver case*, and it is to be presumed the proceeding was so disposed of by the county court. The appellee commissioners properly accepted the decision in the *Culver case* and the striking of the proceeding from the docket of the county court as final, and were fully warranted in taking steps, under the statute, to recover the cost of making the improvement from the property which had been benefited thereby. This latter ordinance and the proceedings thereunder were in no way violative of the orders of this court that the writ of error in the *Farrell case* should operate as a *supersedeas*. On the contrary, the action of the commissioners in abandoning the old ordinance and the proceedings thereunder was in obedience to the *supersedeas* orders of this court that they should not proceed further under the prior ordinance.

The trial court properly excluded testimony tendered by appellants for the purpose of showing the cost of that portion of the improvement upon which the property of appellants, or some of them, abutted. The proportionate share of the cost of the improvement to be paid by the

different pieces of property is the proportionate share of the cost of the improvement as a whole. The cost of that portion of the improvement which adjoins the property to be assessed has no tendency to show the proportionate part of the cost of the whole improvement to be borne by such property. Other objections of the appellants, equally untenable, were presented by the appellants in the *Cummings case*, *supra*, and are discussed in the opinion in that case.

The grounds of the objections to the action of the court in passing upon instructions to be given the jury are disposed of by what has been said hereinbefore in the discussion of other alleged errors.

The affidavits as to newly discovered evidence, filed in support of a motion presented by appellants to set aside the order overruling their motion for new trial, were insufficient to entitle the appellants to a favorable decision on the motion. The testimony relied on as newly discovered, so far as it is in any way important, was contained in the ordinance, plans, specifications and estimates, which were, of course, open to the inspection of appellants,—indeed, compose a part of the record in the cause,—and could have been known at the time of the trial by the exercise of the requisite diligence. The alleged changes in the manner of the construction of the improvement, referred to in said affidavits, so far as at all material, were such, only, as were apparent to observation, and by the exercise of even slight diligence would have come to the knowledge of every one interested, as were the appellants, in considering whether the improvement had been completed as contemplated by the ordinance. *Dyk v. DeYoung*, 133 Ill. 82; *Plumb v. Campbell*, 129 id. 101.

The judgment is affirmed.

*Judgment affirmed.*

## KINGMAN &amp; Co.

v.

GEORGE G. MOWRY *et al.*

*Opinion filed October 13, 1899—Rehearing denied December 6, 1899.*

1. PLEADING—*averments of answer not challenged by replication are admitted.* In a cause submitted to the court for decision upon bill and answer, the averments of the answer must be accepted as true when not challenged by replication.

2. FRAUD—*conveyance may be fraudulent in law, regardless of debtor's motives.* A conveyance of property by a debtor in good faith and without intent to defraud is fraudulent in law, without regard to the motives which prompted it, when its legal effect is to work a fraud on the rights of a creditor.

3. SAME—*when transfer of property to corporation formed by debtor is not fraudulent.* The formation of a corporation by a debtor who transfers all his property to it in good faith, after notice to his creditors and with the approval of most of them, as being the most desirable method of conserving the interests of all, is not fraudulent, either in fact or law, where the debtor retains the open ownership of the stock interest based upon the value of the property.

4. SAME—*change in form of property by debtor is not fraudulent in law.* A mere change of property by a debtor into a stock interest in a corporation, to which the property is conveyed, is not fraudulent in law on the ground that it compels a creditor to levy upon and sell the stock interest instead of the property, upon which the creditor had no lien.

5. SAME—*a debtor may pledge stock of corporation formed by him, to secure money to pay debts.* The act of a debtor who pledges the stock of a corporation formed by him, and to which he transferred all his property, is not fraudulent, where the assignment was made as security for money loaned to him wherewith to discharge his *bona fide* indebtedness.

*Mowry v. Kingman & Co.* 81 Ill. App. 462, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Henry county; the Hon. FRANK D. RAMSAY, Judge, presiding.

The appellant company held two judgments against the appellee George G. Mowry, on which executions had been returned *nulla bona*. This was a creditor's bill by

the appellant company to set aside certain transactions alleged to have been consummated in fraud of its rights, as the owner of those judgments. The allegations of the bill, in substance, were, that the judgment debtor, for the purpose of hindering and delaying his creditors, had transferred all of his property to the George G. Mowry Implement Company, a corporation which he had caused to be formed for that purpose. The prayer of the bill was, the property so conveyed to the corporation should be decreed to be subject to the lien of appellant's judgments. Appellees Ainsworth and Edward A. and William Mowry were made parties to the bill on the alleged ground they had fraudulently colluded with the debtor in the formation of the corporation and the transfer of the debtor's property, and claimed some interest therein.

The joint answer of the defendants admitted the allegations of the bill as to the judgments, and alleged that prior to the rendition thereof the judgment debtor was seriously embarrassed financially and unable to pay his indebtedness, and that he called a meeting of his creditors on the 24th day of November, 1896, of which meeting he gave each creditor, including the appellant, written notice; that at said meeting nearly all of the creditors, including the appellant, were represented; that all of the property of the debtor, and his indebtedness, was fully and truthfully made known to the said creditors at said meeting and the same was verified by a representative of one of the largest creditors; that the debtor offered to assign and deliver all of his property, of every nature and kind, for the benefit of his creditors, without any preferences whatever, or that he would deliver to them his notes, with appellee Ainsworth as surety, for the sum of thirty-five per cent of the face value of their claims, and that Ainsworth would cash said notes at ninety-five cents on the dollar, if the creditors, or any of them, preferred; that Ainsworth was present, and stated to the creditors that his proposition was based upon the un-

derstanding the property of the debtor should be transferred to a corporation to be formed for that purpose, and the stock of the corporation should be assigned to him as security for the obligations assumed and any outlays made by him thereunder; that the representatives of the creditors then present, including the representative of the appellant company, were of opinion it was better for the interest of the creditors the proposition to pay thirty-five cents on the dollar should be accepted, and that manner of settlement was accepted by all present except the representative of the appellant, who declined on the ground he was not authorized to accept it, but agreed to recommend the acceptance of the proposition to his principals, the principals, however, declining to accept either proposition; that the debtor, in deference to the views of by far the greater number of his creditors, and in the belief that his creditors would be finally satisfied, proceeded to complete the formation of a corporation with a capital stock of \$15,000, divided into one hundred and fifty shares; that all of the personal assets of the debtor were transferred to the corporation in full payment of the capital stock; that ten shares of the stock were delivered to Edward A. Mowry in satisfaction of an indebtedness *bona fide* due him, and five shares to William A. Mowry, and the remainder of the shares, one hundred and thirty-five in number, were issued to the debtor, and that all of the shares were assigned and delivered to the appellee Ainsworth as security for his undertaking, as aforesaid; that all of the creditors except the appellant, and two or three others who held small claims, accepted the Ainsworth proposition, and that Ainsworth has paid to the creditors of the judgment debtor about the sum of \$6000 in full discharge of their claims and is ready and willing to settle with all others upon the same terms, but that the appellant company demands fifty per cent of its claim, which Ainsworth is not willing to pay and which the debtor, though anxious to do so, is unable

to pay. The answer also disclosed that the real estate of the debtor was of no value above the encumbrances thereon and the homestead right of the debtor, and that the debtor had executed a mortgage thereon to Ainsworth as additional security, and had also transferred to Ainsworth a policy of life insurance of the cash value of about \$400, as further additional security. The answer further averred that all the acts of the defendants were taken and had in good faith, as being for the best interest of all his creditors, and without intent of hindering or delaying any of them in the collection of their claims.

Replication was not filed, but the cause was submitted to the court to be determined upon the bill and answer, without proofs. The circuit court decreed the transfer of the property to the corporation was in fraud of the rights of the appellant company, and that the property so transferred was subject to the lien of the executions issued on the judgments held by the appellant company, but that the appellee Ainsworth was equitably entitled to a superior lien on such property to secure him for outlays made in obtaining satisfaction of the claims of the judgment debtor. On an appeal prosecuted by the appellant company the Appellate Court for the Second District reversed the decree of the circuit court and refused to remand the cause.\* The case is before us on the further appeal of the appellant company.

ARTHUR KEITHLEY, for appellant:

It is actual fraud for a failing debtor to form a corporation and convey to it all of his property and continue business in the name of the corporation. *Bank v. Trebein*, 52 N. E. Rep. 834; *Bennett v. Minott*, 28 Ore. 339; *Kellogg v. Bank*, 58 Kan. 43; *Terhune v. Bank*, 45 N. J. Eq. 344; *Web. Co. v. Dienelt*, 133 Pa. St. 585; *Hibernia Co. v. Transportation Co.* 13 Fed. Rep. 516; *Chatterton v. Mason*, 37 Atl. Rep. 960.

Any device by a debtor in failing circumstances to dispose of his property for the benefit of his creditors,



otherwise than by a general assignment, is void. *Nesbitt v. Digby*, 13 Ill. 388; *Phelps v. Curts*, 80 id. 109; *Milligan v. O'Connor*, 19 Ill. App. 487; *Gardner v. Bank*, 95 Ill. 298.

A transaction may be fraudulent in law although the parties executing it did so with honest intentions. *Phelps v. Curts*, 80 Ill. 109; *Moore v. Wood*, 100 id. 455; *Davidson v. Burke*, 143 id. 146.

A creditor cannot purchase of his failing debtor any more goods than sufficient to satisfy his own claim, although he pays full cash value for the excess. *Oakford v. Dunlap*, 63 Ill. App. 499; *Beaver v. Danville Shirt Co.* 69 id. 321; *Hanchett v. Goetz*, 25 id. 445.

A deed fraudulent in fact is void as against creditors, and is not permitted to stand for any purpose of reimbursement or indemnity. *Beidler v. Crane*, 135 Ill. 92.

DUNHAM & FOSTER, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The truth of the averments of the answer was not challenged by replication, but the cause was submitted to the court for decision upon bill and answer. The answer was, therefore, to be accepted as true. *Pankeij v. Raum*, 51 Ill. 88; *Fordyce v. Shriver*, 115 id. 530; *County of Cook v. Great Western Railroad Co.* 119 id. 218.

It appears indisputably from the facts set forth in or by the answer, the transaction here sought to be invalidated was entered into and executed in actual good faith and without any desire to defraud creditors. If, however, its legal effect was to work a fraud on the rights of the appellant as a creditor, it will be deemed fraudulent as an inference of law, without regard to the motives which prompted it. *Lawson v. Funk*, 108 Ill. 502.

The contention of appellant is, the transfer by a debtor of his property to a corporation necessarily hinders and delays the creditor in the collection of his debts, and is in all instances a fraud, in legal contemplation. Adjudged

cases are cited as in support of this position. We have examined these cases, and while such transactions were condemned in the instances then under consideration, we do not understand it is to be deduced from them that it is a fixed rule of law that the formation of a corporation by the debtor, and the conveyance of all his property to the corporation, though made in actual good faith, is conclusively presumed to be fraudulent as a matter of law. One of such cases (*Bennett v. Minott*, 28 Ore. 339,) held, to quote from the opinion: "When a debtor, for the purpose of hindering and delaying creditors, organizes a corporation and transfers to it all his assets, he himself being the owner of practically all the corporate stock, and continuing the business the same after as before the incorporation, using the proceeds for his own benefit, equity will set aside such transfer at the instance of creditors, notwithstanding the incorporation is valid, and the corporate stock subscribed by the debtor is subject to sale under execution." And in another (*Kellogg v. Bank*, 58 Kan. 43,) it was said: "A fraud may be perpetrated by an insolvent merchant through the instrumentality of a corporation organized and controlled by himself, to which he transfers the bulk of his property, as well as by a transfer to an individual; and where it appears that this has been done for the purpose of hindering and delaying creditors, and enabling the debtor to retain the management and control of his property and of depriving his creditors of an opportunity to collect their dues, and when such insolvent retains substantially all the stock in the corporation and no innocent person contributes any substantial sum to its assets, the court, in sustaining attachments levied on the property and directing the sale thereof to satisfy the claims of creditors, is warranted in treating the whole transaction as a sham."

Expressions of the court in *First Nat. Bank v. Trebein*, (Ohio,) 52 N. E. Rep. 834, (the case most relied on,) give some support to the view entertained by counsel for ap-

pellant, but in that case it was said: "The formation of the corporation in no way facilitated the transaction of his (the debtor's) milling business and that connected with it. Nothing was added to his capital, unless we regard the few hundred dollars that may have been paid for the four shares of stock taken by the other members of his family such an addition. Evidently an addition to capital was not the controlling object. \* \* \* The only purpose the creation of the corporation and the conveyance to it subserved was to hinder creditors in levying upon the property and selling it on execution at law; and it is this hinderance the law will not permit, and, when ascertained in a proper proceeding, requires the conveyance to be set aside and the property administered for the benefit of all the creditors of the fraudulent grantors. \* \* \* We are clearly satisfied that the conveyance by Trebein of his property to the corporation was made to hinder and delay creditors, and should have been so declared by the court."

It is believed that in each of the cases relied upon some circumstance of fraudulent intent, as the reservation of a trust in favor of the debtor, the design to create and administer the corporation for the mere purpose of enabling the debtor to conduct his business under the guise of a corporation and escape, even temporarily, his creditors, or some improper disposition or manipulation of the stock interest of the debtor to the injury of his creditors, or other like consideration, determined the action of the court. Certainly, if such a conveyance be made with the consent and approval of all of the creditors it would be valid. If, as here, entered into after notice to all the creditors and with the consent and approval of the greater number of them, as being the most desirable method of conserving the interests of all without any purpose or design of defrauding any creditor, and the debtor retains the open ownership of a stock interest based upon the value of the property conveyed, and

equally open, as was such property, to seizure and sale on execution against the debtor as was the transferred property, the transaction cannot be deemed fraudulent, either in fact or as a matter of law.

It is urged the transaction is fraudulent in law, for the reason, if effectual, it prevents appellant, as a creditor, from seizing the property which the debtor owned and conveyed to the corporation, and forces the appellant to levy upon and sell the stock interests of the debtor instead. The appellant had no lien upon the property, nor any right to demand the debtor should refrain from making any disposition of the same which his judgment and discretion, fairly and justly exercised, would dictate as proper and advisable in view of the rights and interests of his creditors and the situation and circumstances of his estate, provided the result of such action on the part of the debtor should leave the proceeds of the transaction still subject to the process provided by law for the collection of judgments. The law has no universal rule that a mere change of the property into a stock interest in a corporation must be denounced a fraud in legal contemplation though it may be clearly seen it is not so in fact. The operations of a debtor in dealing with his property may so change its character as to make it more inconvenient to levy upon and sell the same under execution without subjecting the debtor, as matter of law or fact, to the charge he has fraudulently hindered and delayed his creditors in the collection of their debts. Pledging the stock to Ainsworth to secure the money advanced by the latter was not a fraudulent act. The debtor had the right to borrow money wherewith to discharge his *bona fide* indebtedness and to secure the party loaning the money by the assignment of his shares of stock.

The judgment of the Appellate Court is correct and is affirmed.

*Judgment affirmed.*

## IN MATTER OF ASSIGNMENT OF NATHAN LANDFIELD.

*Opinion filed October 13, 1899—Rehearing denied December 7, 1899.*

1. APPEALS AND ERRORS—*section 90 of Practice act and section 8 of Appellate Court act are in pari materia.* Section 90 of the Practice act and section 8 of the Appellate Court act, which relate to the right of appeal to and from the Appellate Court, are *in pari materia*, and must be construed together.

2. SAME—*when appeal will not lie to Supreme Court.* The Appellate Court's judgment affirming an order of the county court, in voluntary assignment, denying the assignor's petition for an exemption of \$400, is final under section 90 of the Practice act, since the amount involved is less than \$1000; nor is an appeal therefrom authorized by section 8 of the Appellate Court act, allowing appeals in "all other cases" except in actions *ex contractu* and those sounding in damages which involve less than \$1000.

*In Matter of Landfield*, 80 Ill. App. 417, appeal dismissed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GILBERT & GILBERT, (ROSENTHAL, KURZ & HIRSCHL, of counsel,) for the assignor.

CRATTY, JARVIS & CLEVELAND, for certain creditors.

Mr. JUSTICE CARTER delivered the opinion of the court:

Nathan Landfield, the appellant, made a voluntary assignment of all of his property, except what was exempt by law, for the benefit of his creditors. Afterward he filed his petition in the county court for an order to set aside for him, for such exemption, \$400 in the hands of his assignee, of the proceeds of the assigned property. The county court denied the petition, and its final order has been affirmed by the Appellate Court.

The motion of appellees, certain creditors, to dismiss the appeal to this court was reserved to the final hearing. The ground of the motion is, that, the amount in-

volved being less than \$1000, no appeal lies to this court from the judgment of the Appellate Court. As the sum or value in controversy does not exceed \$1000 it is plain the appeal cannot be sustained under section 90 of the Practice act. But appellant contends that it was properly taken under section 8 of the Appellate Court act. The part of that section applicable here is as follows: "In all cases determined in said Appellate Courts in actions *ex contractu* wherein the amount involved is less than one thousand dollars (\$1000) exclusive of costs, and in all cases sounding in damages wherein the judgment of the court below is less than one thousand dollars (\$1000) exclusive of costs, and the judgment is affirmed or otherwise finally disposed of in the Appellate Court, the judgment, order or decree of the Appellate Court shall be final and no appeal shall lie or writ of error be prosecuted therefrom: *Provided*, the term *ex contractu*, as used in this section, shall not be construed to include actions involving a penalty. In all other cases appeals shall lie and writs of error may be prosecuted from the final judgments, orders or decrees of the Appellate Courts to the Supreme Court." (Hurd's Stat. 1897, p. 506.) Appellant contends that this is not an action *ex contractu*, or one sounding in damages, but a proceeding under the statute in the administration of an insolvent estate in the county court, and that it therefore falls under the clause, "in all other cases appeals shall lie," etc.

Counsel on both sides have contented themselves with mere argument, and left to the court the labor of looking up the decided cases. We have held in several cases that said section 90, and section 8 of the Appellate Court act, passed in 1877, are *in pari materia* and must be construed together. (*International Bank v. Jenkins*, 104 Ill. 143; *Baber v. Pittsburg, Cincinnati and St. Louis Railroad Co.* 93 id. 342.) The amendments which have since been made do not affect the question here at issue. In *Richards v. People ex rel.* 100 Ill. 423, we held that under the

statute an appeal would lie from the Appellate Court to this court from a judgment affirming a decree of a circuit court enjoining the appellant in that case from obstructing a highway; that the case fell within the provisions of the eighth section allowing appeals "in all other cases" than those of the character previously described in the statute, and the appeal was not precluded by section 90. (See, also, *Hyslop v. Finch*, 99 Ill. 171.) The case at bar is, however, very different from the *Richards case*, but the question here involved has, in effect, been decided in the *Baber case*, above cited. As there noted, section 90 provides that "in all criminal cases, and in all cases where a franchise or freehold or the validity of a statute is involved, and in all other cases where the sum or value in the controversy shall exceed \$1000, exclusive of costs, which shall be heard in any of the Appellate Courts upon errors assigned, if the judgment of the Appellate Court be that the order, judgment or decree of the court below be affirmed, \* \* \* any party to such cause shall be permitted to remove the same to the Supreme Court by appeal or writ of error," etc.; and it was said in that case (p. 346) that section 90 "embraces three distinct classes of cases, namely: (1) criminal cases; (2) all cases which involve a franchise, freehold or the validity of a statute; (3) all cases where the sum or value in the controversy exceeds \$1000, exclusive of costs. With respect to the first two classes of cases there can be no controversy or diversity of opinion. \* \* \* The ninetieth section, in defining the third class, is very broad and comprehensive in its terms. Leaving out of view the limitation with respect to value or amount, it includes all cases whatsoever, directly involving property rights, not falling within the second class of that section, without regard to whether the proceeding is at law or in equity, or whether the action is in form *ex contractu* or *ex delicto* or a mere statutory proceeding, and it therefore, of course, includes all cases in actions *ex contractu*, and 'cases sounding in

damages,' specified in the eighth section, subject to the limitation as to amount or value, as above suggested. The ninetieth section being thus general in its terms, and including all cases directly involving property rights, as we have just seen, and having expressly limited the right to an appeal or writ of error to those cases in which the sum or value in controversy *exceeds* \$1000, exclusive of costs, it follows the amount therein specified must control all cases whatsoever, except such as may by specific provisions be taken out of the rule therein prescribed."

This case is not, of course, included in either class 1 or class 2, but is one involving property rights, and there is a sum or value in controversy; but as that sum or value is less than \$1000 the case does not come within the third class, and no appeal lies to this court. The two sections of the statute being construed together, it is seen that the case is not within the provision of section 8 allowing appeals "in all other cases."

The motion to dismiss the appeal must prevail, and the appeal is dismissed.

*Appeal dismissed.*

## THE CHICAGO AND ALTON RAILROAD COMPANY

v.

KATIE C. KELLY, Admx.

*Opinion filed October 19, 1899.*

1. APPEALS AND ERRORS—*opinion of Appellate Court is of binding authority on that court on second appeal.* An opinion of the Appellate Court disposing of assignments of error respecting the appellant's negligence and the action of the trial court in refusing to direct a verdict for appellant, is of binding authority upon such points on second appeal in the same cause, under section 17 of the Appellate Court act, (Hurd's Stat. 1897, p. 508,) where the evidence and verdicts in the two trials are the same.

2. EVIDENCE—*admissibility of rules of post-office department in action for death of mail clerk.* Evidence that a rule of the post-office department requires a transfer mail clerk to use extraordinary vigilance in guarding mails, and not to leave them exposed, is competent in

182	267
88a	236

182	26
89a	*34
89a	*34

182	26
190	*22
190	*48

182	26
96a	*40
182	26
99a	*48

182	26
194	*44

182	267
198	*15
199	*36
199	*37

182	267
108a	*64



an action to recover for the death of a clerk killed by a freight train while attempting to cross the tracks to receive mail from an incoming passenger train.

3. INSTRUCTIONS—*one cannot complain of infirmities in his own instructions.* An appellant cannot take advantage of an infirmity in an instruction given at his request.

4. SAME—*when instruction on question of damages in action for death is not objectionable.* An instruction that the jury may, in estimating damages caused by a person's death, consider what, from the evidence, the widow and next of kin might reasonably have expected, in a pecuniary way, from his continued life, is not objectionable.

5. SAME—*instructions should not attempt to state what facts constitute negligence.* What is or what is not negligence is a question of fact for the jury, and is not a proper subject for an instruction.

*Chicago and Alton Railroad Co. v. Kelly*, 80 Ill. App. 675, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

Appellee, as the administratrix of George J. Kelly, brought this suit against appellant for negligently causing the death of her intestate. A trial by jury resulted in a verdict and judgment against appellant for \$5000, from which it appealed to the Appellate Court, where the judgment has been affirmed. The present appeal is from such judgment of affirmance.

Appellee's intestate, at the time he was killed, was in the employ of the United States as transfer mail clerk at Bloomington, it being his duty to transfer mail to and from various trains arriving and departing from the union depot, the railroads intersecting at this point being two branches of appellant, with double track, the Big Four and Lake Erie and Western. On the night Kelly was killed the regular mail train for St. Louis was due at the station at 1:25 A. M., and upon its arrival upon the east track a freight train also arrived from the south upon the west track, and the two trains thus came to the station at the same time, the latter at a speed of from ten to

twenty-five miles per hour. The depot is situated on the west side of the two tracks, and between the tracks was a small platform where the mail from the south-bound trains was usually placed to be taken by the transfer clerk. To reach this platform from the depot it was necessary to cross the west track upon which the freight train was approaching, and in attempting to do this Kelly was struck by the engine of the freight train and instantly killed.

JOHN E. POLLOCK, (WILLIAM BROWN, of counsel,) for appellant.

FIFER & BARRY, FRANK GILLESPIE, and A. M. CONARD, for appellee.

Per CURIAM: In deciding this case the Appellate Court delivered the following opinion:

"The case was before us at a former time, and was then reversed and the cause remanded for reasons stated in the opinion of the court. (75 Ill. App. 490.) So far as concerns the assignment of error by which the negligence of the appellant is brought in question, and the action of the trial court in refusing the peremptory instruction to find a verdict for appellant, we must accept the verdict of two juries, and our former opinion relative to these questions, as decisive of these points. The facts established by the evidence, relative to the alleged negligence of appellant by which the death of Kelly was occasioned, are not substantially different in the present record from those appearing in the former. When the case was before us in the first instance we said: 'The running of a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is so plainly negligent as not to require comment. It is equally negligent to so run a freight train just as the passenger train is pulling into the station, and more especially when the track upon which

the freight train is moving is between the depot and the track on which the passenger train is moving.' Accepting this quotation from our former opinion as binding authority in this case upon the point in question, as we think we must, under section 17 of the Appellate Court act, we come to consider the remaining question of fact presented by the assignment of errors and argument of counsel, whether the deceased was in the exercise of ordinary care for his own safety at the time he received his injuries, whereby his death was occasioned.

"To properly determine this question it should be borne in mind that the appellee's intestate had been a transfer clerk in the United States mail service, at this junction, for more than a year before his death. It is reasonable to infer from his length of service he was acquainted with the rules of appellant in respect to the running of its trains, and that he would, in the exercise of ordinary care, conform his actions in respect thereto. The following rules were in force at this station at the time of the accident in question.

"Rule 13. Passenger trains standing at stations on double track.—Trains approaching a station where a passenger train may be standing, receiving or discharging passengers, must be *stopped* before reaching the passenger train, and must not be started before the passenger train moves forward. When two passenger trains, running in opposite directions, arrive at a station on double track at or about the same time, the train having the right of the road (on single track) will have the right to go to the station platform first, and the other train must stand back until the opposite train has discharged its passengers and departed.

"Rule 26. The speed of trains must not exceed six (6) miles per hour through incorporated cities and towns on the line.'

"If, as contended by counsel for appellant, the deceased was notified that the freight train which killed

him was coming, as well as the passenger train from which he was to receive mail, he had the right to rely upon appellant complying with its rule in this respect, and relying upon it he knew that the freight train would be stopped before reaching the passenger train, and that he could with safety do as he did. The freight train was not stopped as the rule required; resulting in the death of appellee's intestate. We think conclusions like this were fair and reasonable from all the evidence, and the jury were at liberty to infer ordinary care and diligence on the part of the deceased from all the circumstances of the case. To hold otherwise would be, in effect, to presume negligence on the part of one, in excuse of negligence on the part of another. *Illinois Central Railroad Co. v. Nowicki*, 148 Ill. 29, and cases cited; *Chicago and Northwestern Railway Co. v. Hansen*, 166 id. 623.

"It is insisted, also, that the court erred in the admission in evidence of the rule of the post-office department regulating the conduct of clerks in the transfer of mail, which is as follows: 'Transfer clerks are expected to use extraordinary vigilance in guarding the mails under their charge, which must not be left for a moment exposed, day or night, and especially in making transfers where there is a considerable portage between trains. They should accompany the mails upon the wagons in all cases possible where there is no authorized clerk in charge of the same, and sit in such position, at all times, as to be able to instantly detect the loss of a pouch or sack.' It is well known the railroads have contracts with the government with respect to carrying mails. It is a part of their business as common carriers. They know, also, the government has in its employ various agents for the purpose of handling and transferring the mails, such as the appellee's intestate, and it should be presumed the employees of appellant were familiar with his duties, and might reasonably be expected to anticipate his presence at the time and place in question in

the regular discharge of his duties. It is not unreasonable also to infer that appellant, being in a sense in the same line of employment with the deceased in handling the mail, was familiar with the rule in question, and was thereby informed of the duties of the deceased, and should have, in the exercise of ordinary foresight, expected his presence at the time and place in question in discharge of his duties under such rules, and to have regulated their trains with due regard to his safety. Considerations of this kind surely made the rule competent evidence for the consideration of the jury.

"It is next insisted that the court, in its instructions to the jury, gave two definitions of ordinary care,—one at the request of appellee, by which it is defined to be such care as a reasonably prudent person would exercise under the same or like circumstances; and at the request of appellant, that it is such care as a reasonably prudent person would exercise under the same or like circumstances while in the exercise of care, and not at a time when such prudent person happened to be careless. We fail to see any substantial difference in the two statements of that which constitutes ordinary care, except that in the latter instance the instruction assumes that a prudent person would be careless,—an infirmity in appellant's own instruction of which it could take no advantage.

"It is also complained that the fifth instruction given for appellee, in which the jury are told they may, in estimating damages, consider whatever they may, from the evidence, believe the widow and next of kin might have reasonably expected, in a pecuniary way, from the continued life of the intestate. We see no ground for the criticism put upon this instruction. What the widow and next of kin might reasonably expect would be the same as any other reasonable person might reasonably look forward to as something believed to be about to happen or come, and by this test the same question was submit-

ted to the jury, as reasonable men, to say, from the evidence, what such reasonable expectation would be.

"Again, it is insisted the court erred in refusing to instruct the jury, at the instance of appellant, that if the deceased did not look to see if the freight train was approaching, and that by reason of his failure to look he was injured, he could not recover. In the later cases the tendency of the decisions has been to the effect that what is or what is not negligence is a question of fact for the jury, and it is improper to state such matter in an instruction. (*Louisville, New Albany and Chicago Railway Co. v. Patchen*, 167 Ill. 204, and cases cited.) In *Chicago and Northwestern Railway Co. v. Hansen*, 166 Ill. 623, it is said: 'And formerly this court, in passing upon questions both of law and fact, frequently prescribed that same duty, (to look and listen,) but it has since been repeatedly held that it cannot be said, as a matter of law, that a traveler is bound to look or listen, because there may be various modifying circumstances excusing him from so doing. \* \* \* It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety under the circumstances must be left to the jury as one of fact.' In *Partlow v. Illinois Central Railroad Co.* 150 Ill. 321, the court say: 'It has often been said by this and other courts that it is the duty of a person approaching a railroad crossing to look and listen before attempting to cross, and that a person failing to observe this precaution is guilty of negligence; but when the statement has been made, the court, as a general rule, was discussing a question of fact, and in such case the statement may be regarded as accurate. But the court cannot say, as a matter of law, that the failure to look and listen is negligence. These facts are proper for the consideration of the jury in determining whether a person has been negli-

gent, but it cannot be said, as a matter of law, that the failure to observe such acts is negligence,'—citing *Chicago and Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132; *Terre Haute and Indianapolis Railroad Co. v. Voelker*, id. 540; *Chicago, Milwaukee and St. Paul Railroad Co. v. Wilson*, 133 id. 55. It follows, therefore, that the instructions upon this point were properly refused.

"Finding no material error in the record the judgment of the circuit court will be affirmed."

We concur in the conclusion reached by the Appellate Court, and in the views above expressed. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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## THE INDEPENDENT MEDICAL COLLEGE

v.

THE PEOPLE *ex rel.* Akin, Attorney General.

*Opinion filed October 16, 1899—Rehearing denied December 7, 1899.*

1. *QUO WARRANTO*—*rules of pleading and evidence in criminal cases do not apply to quo warranto.* A proceeding by information in the nature of *quo warranto* to forfeit the franchise of a medical college is not a criminal one, in the sense that the offense must be charged with that degree of certainty necessary in an indictment; nor are the rules of evidence as to the competency of depositions the same in this as in an ordinary criminal proceeding.

2. *SAME*—*information need only satisfy rules of civil pleading.* An information in the nature of *quo warranto* which charges the grounds upon which a forfeiture of the defendant's charter is urged, with all certainty required in civil pleading, is sufficient.

3. *MEDICAL SCHOOLS*—*when charter of medical school should be forfeited on quo warranto.* The charter of a medical college should be revoked in a proceeding by *quo warranto* where it confers degrees and issues diplomas for a price, without regard to the qualification or fitness of the applicant to practice medicine.

APPEAL from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

JAMES LANE ALLEN, for appellant.

E. C. AKIN, Attorney General, (C. A. HILL, and B. D. MONROE, of counsel,) for the People.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding by information in the nature of a *quo warranto*, brought in the circuit court of Cook county, February term, 1898, by the People, on the relation of the Attorney General, against the Independent Medical College, a corporation, of Chicago, to forfeit its franchise or charter. The corporation was chartered in 1896, having as its object the establishment of "an institution of learning," and "for the purpose of promoting mental and physical culture," and for teaching branches taught in medical colleges generally, with power to grant diplomas and confer degrees. The information charges that the corporation is conducted for pecuniary profit; that it confers degrees and issues diplomas for a price, without regard to the qualification or fitness of the applicant to practice medicine; that in some cases no examination whatever is required, and degrees are conferred upon persons wholly unfit and incompetent; that in one case, specifically alleged, a diploma or license to practice medicine and surgery was granted for the price of \$25, the applicant never having been a student of medicine or surgery. It is further charged that the corporation "is a mere diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice."

The respondent filed a plea to the information, denying its general allegations, and averring that it has not resorted to wrongful or unlawful methods in conferring degrees as a means of profit to its incorporators, and that it has not issued diplomas to persons wholly incompetent to practice medicine. To this plea the Attorney General filed a replication, averring that the defendant "has usurped and misused, and does now usurp and misuse, its liberties, privileges and franchises," and tender-



ing issue. Issue being joined, the cause was heard by the court without a jury, upon the pleadings and evidence taken. The court found the defendant guilty as charged, and rendered judgment that the Independent Medical College be ousted and excluded from the exercise of all its corporate privileges and franchises under its articles of incorporation. The defendant prosecutes this appeal.

It is assumed by counsel for appellant that this is a criminal proceeding, and upon that assumption are based the contentions that the information does not recite with sufficient certainty the offense charged; second, that the trial court erred in admitting in evidence certain depositions introduced by the People; and finally, that the evidence is not sufficient to warrant the judgment.

The proceeding is not a criminal one in the sense the offense must be charged with that degree of certainty necessary in an indictment; nor are the rules of evidence as to the competency of depositions the same in this as in an ordinary criminal proceeding. *Distilling Co. v. People*, 156 Ill. 448; *People v. Bruennemer*, 168 id. 482, and cases cited.

As to the sufficiency of the information, we said in *Distilling Co. v. People*, *supra*, (p. 482): "The tendency of the courts in modern times being to regard an information in the nature of a *quo warranto* in the light of a civil remedy, invoked for the determination of civil rights, although still retaining its criminal form and some of the incidents of criminal proceedings, the better doctrine now is that the pleadings should conform, as far as possible, to the general rules and principles which govern in ordinary civil actions. (High on Ex. Legal Rem. sec. 710.) And this is especially so in this State in view of section 10 of our Practice act, which provides that in cases of this character it shall be sufficient to summon, the defendant to appear and answer the plaintiff in an action of *quo warranto*, and that the issues shall be made up by answering, pleading or demurring to the petition as in other cases." (See, also, *People v. Bruennemer*, *supra*.)

It has been frequently held that the proceeding is civil in its nature, and governed by the rules of practice applicable to such trials. This information charges the grounds upon which a forfeiture of the defendant's charter is urged, with all the certainty required by the rules of civil pleading; and those grounds, if sustained by the proof, were sufficient, as held in *Illinois Health University v. People ex rel.* 166 Ill. 171, where we said, among other things: "It is not consistent with the public policy of a State which enacts stringent laws for the preservation of the public health and for the protection of its people from quacks and ignorant pretenders to a knowledge of the science of medicine and surgery, to authorize or permit a pretended health university to turn any one, whether known or unknown, qualified or unqualified, into a doctor of medicine, armed with a diploma and degree as one qualified to heal the sick, who may answer its prescribed list of questions and pay its prescribed fee." And it was there held, for such abuse and misuser the charter of the corporation should be revoked,—citing *Edgar Collegiate Institute v. People*, 142 Ill. 363. The health university, respondent in the above case, was practically the same institution as the one now before the court, and the only material difference in that case and this is, that there the ouster was upon a demurrer to the information, whereas here there was a trial upon the issues of fact.

Without an extended analysis or weighing of the testimony introduced upon the trial as it appears in this record, we have no hesitancy in saying that it fully justified the finding and judgment of the court below. In fact, it is sufficient to establish the guilt of the defendant, as charged in the information, beyond a reasonable doubt, and would have justified not only the forfeiture of the charter, but the infliction of a fine upon the parties guilty of the abuses.

The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

## PHILLIPS J. GREENE

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 16, 1899—Rehearing denied December 7, 1899.*

1. COURTS—*right of a superior or circuit judge to preside in criminal court of Cook county.* A judge of the superior or circuit court of Cook county is authorized to preside in the criminal court although not previously designated by the judges of the circuit and superior courts for that duty, under section 26 of article 6 of the constitution, providing for the holding of such court by such judges, as nearly as may be in alternation, as may be determined by them.

2. PERJURY—*legality of appointment of master administering oath can not be questioned in perjury case.* The legality of the appointment of a master in chancery or his power to administer an oath cannot be questioned on the trial for perjury of one who, it is alleged, testified falsely before him.

3. SAME—*fact that the defendant in perjury case was sworn raises presumption that the oath was binding.* In a trial for perjury committed before a master in chancery, proof that the defendant was sworn as a witness sufficiently establishes, in the absence of proof to the contrary, that a binding oath was administered to him.

4. SAME—*conviction may be had while suit in which false testimony was given is pending.* The court may, in its sound discretion, proceed to final verdict in a trial for perjury although the case in which the false testimony was given is still pending.

5. SAME—*when perjury indictment is sufficient in averment of materiality of false testimony.* An averment in an indictment for perjury that the alleged false testimony was in a matter material to the issue is sufficient, and a preceding allegation relating to the materiality of the matter may be entirely rejected as surplusage.

6. SAME—*when false testimony is upon material issue.* In an action to foreclose a mortgage for the whole debt declared due by its holder upon non-payment of interest coupons, testimony in support of a defense that the amount of the interest was tendered to the complainant is material to the issue, and if falsely given is perjury.

7. APPEALS AND ERRORS—*objection of variance must be made below.* An objection for variance, to be available upon appeal or writ of error, either in a civil or criminal action, must be urged in the court below, since, if pointed out and insisted upon, it might have been avoided by amendment or other proofs.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. JOHN BARTON PAYNE, Judge, presiding.

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197	*281
197	*281
197	*288

O'DONNELL & BRADY, (DELOS P. PHELPS, and McKENZIE CLELAND, of counsel,) for plaintiff in error:

Jurisdiction in felony cannot be conferred by consent if it does not by law exist. *Harris v. People*, 128 Ill. 591.

A judge of the superior or circuit court of Cook county cannot preside in the criminal court unless previously assigned to that duty by the judges. Const. sec. 26, art. 6.

Falsity and materiality of facts must appear in an indictment for perjury. 3 Wharton on Crim. Law, secs. 22, 28, 29, 32, 48, 63; *Morrell v. People*, 32 Ill. 500.

The indictment must fully advise the accused of all the material facts relied upon to establish his guilt, and if it fails to do so it is fatally defective. *Kerr v. People*, 42 Ill. 308.

The facts must appear on the face of the indictment, or it must aver that the matter sworn to was material. If it simply avers it was material it must be proved on the trial. 2 Chitty on Crim. Law, 305; *Pollard v. People*, 69 Ill. 153.

Where the false swearing charged is evidence given in a cause, then the previous evidence and state of the cause, or so much of it as shows the matter sworn to was material, must be proved. 3 Starkie on Evidence, 1143; *Young v. People*, 134 Ill. 41.

An indictment for perjury must show conclusively that the testimony given by the defendant was material to the issue. Roscoe on Crim. Evidence, 849, 851, 852, note 2; *State v. Chandler*, 42 Vt. 446.

Where the testimony upon which perjury is assigned is evidence on a trial, and particularly a deposition, the whole of that evidence on the former trial should be proved. *Rex v. Jones*, Peake's N. P. C. 38; *Rex v. Dowlin*, id. 227; 2 Chitty on Crim. Law, (2d ed.) 312; 5 T. R. 311; *Young v. People*, 134 Ill. 41.

A prosecution for perjury alleged to have been committed in a civil action cannot be instituted until after final judgment in such action. *Commonwealth v. Dickinson*,

3 Clark, 164; Wharton on Crim. Law, sec. 2280; 3 Russell on Crimes, 76, 77; *Bullock v. Koon*, 4 Wend. 535.

E. C. AKIN, Attorney General, (CHARLES S. DENEEN, State's Attorney, HAYNIE R. PEARSON, C. A. HILL, and B. D. MONROE, of counsel,) for the People:

Upon motion in arrest of judgment no point can be made of lack of proofs or of variance between the proofs and the indictment. 1 Chitty on Crim. Law, 661; *State v. Graham*, 15 Rich. 310; *State v. Syphrett*, 27 S. C. 29; *Heward v. State*, 13 S. & M. 261; 1 Bishop on Crim. Proc. sec. 1285.

Any judge of the superior court of Cook county has power to preside over a branch of the criminal court, in his discretion. Const. art. 6, sec. 26; *Mitchell v. People*, 70 Ill. 138; *Jones v. Albee*, id. 34; *Railway Co. v. Railroad Co.* 112 id. 589; *Wadhams v. Hotchkiss*, 80 id. 437; *Berkowitz v. Lester*, 121 id. 99; *Waller v. Tully*, 75 id. 576; *Cahill v. People*, 106 id. 621; *People v. Banks*, 24 id. 184; *Railroad Co. v. Horst*, 93 U. S. 291; 12 Am. & Eng. Ency. of Law, 23; *Nudd v. Burrows*, 91 U. S. 426; *Beardsley v. Littel*, 14 Blatch. 102.

A witness may, in the discretion of the court, be tried for perjury before the conclusion of the civil cause in which it was committed. *Commonwealth v. Dickinson*, 3 Pa. L. J. 164; *United States v. Pettus*, 84 Fed. Rep. 791; *People v. Hayes*, 140 N. Y. 484.

The indictment sufficiently alleged that the false testimony was material. An averment that the testimony was given in a matter material to the issue is sufficient, without any recital of facts going to show its materiality. *Pollard v. People*, 69 Ill. 148; *Kimmel v. People*, 92 id. 457; 2 Bishop on Crim. Proc. 921; *Williams v. State*, 68 Ala. 551; *Dilcher v. State*, 39 Ohio St. 130; *People v. Brilliant*, 58 Cal. 214; *Gandy v. State*, 23 Neb. 236.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Plaintiff in error was found guilty of the crime of perjury in the criminal court of Cook county, at its August term, 1898, and after overruling the motion for new trial

and in arrest of judgment the court sentenced him to the penitentiary. To reverse that judgment this writ of error has been sued out.

The accusation is, that in a certain foreclosure proceeding, the evidence being taken before a master in chancery, it became a material inquiry whether or not "the defendant, in the month of October, 1897, tendered to VanVlissingen, trustee, a certain sum of money remaining due upon an interest coupon, and that he, being duly sworn, then and there, in a matter material to the issue of said cause, as aforesaid, did feloniously, willfully, corruptly and falsely swear and testify, among other things, in substance as follows,"—setting out the alleged false testimony.

A great many assignments of error are made upon the record, and many questions are raised in the arguments of counsel for plaintiff in error. It is first insisted that Judge Payne, who presided at the trial, was without jurisdiction, and the only ground of the contention is, that he had not been assigned as a judge to the said criminal court by the judges of the circuit and superior courts of Cook county for that year, others being so appointed to that duty. No objection whatever was made to the fairness and impartiality of the judge, nor was there any intimation whatever that a fair and impartial trial could not be had before him as well as before either of the judges who had been assigned to duty in that court. It also appears, though not materially, as we regard the case, that a necessity existed for calling in a judge not assigned, each of them being so engaged at the time as to be unable to hear the case. The position is, that under section 26 of article 6 of the constitution a judge not selected for duty in the criminal court of Cook county has no jurisdiction in that court. That section, after providing for the continuance of the recorder's court of the city of Chicago as the "criminal court of Cook county," defining its jurisdiction, etc., says: "The terms of said crimi-

nal court of Cook county shall be held by one or more of the judges of the circuit or superior court of Cook county, as nearly as may be in alternation, as may be determined by said judges or provided by law. Said judges shall be *ex officio* judges of said court." It is not denied that Judge Payne was one of the judges who, by the terms of the constitution, were authorized to hold said criminal court, nor that he was one of the judges who, by its language, were *ex officio* judges of that court. We think it too clear for argument that his powers and jurisdiction in that court did not depend upon whether or not the several judges of the circuit and superior courts had designated him for that duty. The language, "as nearly as may be in alternation, as may be determined by said judges," is inserted in the section not for the purpose of conferring or determining who shall have jurisdiction to hold the court, because that is expressly stated in the other language of the section,—that is, the terms shall be held by any of the judges of the circuit or superior court, all of whom are *ex officio* judges of that court,—and the designation of certain of those judges is merely a regulation for the convenience of the judges themselves.

It is next objected that the master in chancery who administered the oath to the defendant at the time it is alleged he gave the false testimony had no authority to do so. This contention is based upon the fact that he was appointed to succeed himself as such master by all the superior judges of the county sitting together, whereas the appointment should have been made by one, only, and that his bond was approved by a single judge; and it is said that either the appointment or the approval of the bond was fatally defective. We do not think the point is well taken; but if it be conceded, still it is clear that he was acting in the capacity of master in chancery at the time, and therefore his authority to administer the oath cannot be questioned in this proceeding. 2 Wharton on Crim. Law, sec. 217; *Morrell v. People*, 32 Ill. 499.

In this connection it is also said that there was no evidence upon the trial that a proper oath was administered. It does appear that the defendant, previous to testifying before the master, was sworn by him as a witness. This, in the absence of proof to the contrary, sufficiently establishes that a binding oath was administered to him. The form of the oath was immaterial. *Gill v. Caldwell*, Breese, 53; *McKinney v. People*, 2 Gilm. 540.

It is urged that the trial for perjury could not be legally had until the foreclosure suit in which it is alleged the false testimony was given had been disposed of. This position is also untenable. In practice, the prosecution for perjury is frequently continued until the proceeding in which the perjury is charged to have been committed has been ended. But it is a rule of convenience, only, and the court trying the criminal charge may, in its sound discretion, proceed to final verdict, notwithstanding the other case is still pending. *People v. Hays*, 140 N. Y. 484.

It is argued at some length that there was a variance between the allegations of the indictment, as to the parties between whom issues were formed in the foreclosure proceeding, and the proofs. This position is based upon the fact that the record in the foreclosure proceeding, introduced in evidence on this trial, showed that certain of the defendants were defaulted, whereas the allegation in the indictment is that issues were formed as to all the parties. Without wishing to be understood as holding that there was in this record a material variance, it is sufficient to say that the question was not raised upon the trial and hence cannot be urged here. Nothing is better settled than that the objection of variance, to be available upon appeal or writ of error, either in a civil or criminal action, must be urged in the court below, and for the reason that if it is pointed out and insisted upon it may be avoided by amendment or other proofs. (*Clay v. People*, 86 Ill. 147; *McKinney v. People*, *supra*.) Authori-



ties cited by counsel for plaintiff in error in no way militate against this well established rule.

The next point made is, that the matter alleged as perjury was not material to the issue, as shown by the indictment and by the testimony. The averment in the indictment is, that the defendant, "to-wit, on the said 13th day of March, in the year of our Lord 1898, in said county of Cook, in the State of Illinois, aforesaid, on the hearing of said cause as aforesaid, where by law an oath or affirmation was then and there required, as aforesaid, in a matter material to the issue of said cause, as aforesaid, did feloniously, willfully, corruptly and falsely swear and testify, among other things, in substance as follows, to-wit: I told Harry F. Williams, on the 22d day of October, 1897, that I had not signed certain orders, and that I had his interest money for him and that he could have it. He said he was there for the purpose of getting the money. I had on the 22d day of October, 1897, \$1030 that had just been paid to me by J. Aaron Adams, 145 LaSalle street. I put my hand in my pocket and pulled out a \$20 bill and a \$5 bill and handed him the money. He said: 'I cannot take that unless you give me the insurance money.' He said, 'VanVlissingen will call you up by telephone.' Mr. Williams said, 'I cannot take the interest; we ought to have the money for the insurance with the orders signed.' I said, 'I will place my own insurance.' This gentleman, Crafts W. Higgins, was there present at the time of the said conversation. There was \$1000 and six months' interest, amounting to \$1030. I put \$20 and \$5 with it. That made \$1055,—the money I told Mr. Williams to take. There never was a direct demand for the interest money alone. Williams said he came to get the interest and insurance money. He said on the 22d of October, 1897, in my office, that he wanted the interest and insurance money. I said, 'There is your money—there is your interest money.' I pushed it towards him and said, 'Take your money.' It was on the leaf of my

desk. Crafts W. Higgins was sitting at the end of my desk in a chair. It would be the west end as you come in from LaSalle street. I had \$1080. It was all there together. I said, 'There is your money; take it.' There was \$1055. I pushed it to him and said, 'Take your money to VanVlissingen.' I stated to Williams the amount of money that was in the roll."

The contention seems to be that the alleged false testimony set out does not show any connection between Williams, the party to whom the defendant swore he offered the money, and VanVlissingen, the trustee, and therefore, it is said, testimony showing the offer to Williams was immaterial to the issue. The indictment is subject to the criticism of being unnecessarily voluminous, but we think it complies with the rules of criminal pleading, in cases of perjury, in its allegations as to the materiality of the alleged false testimony. The rule is, that an indictment for perjury must show that the matter sworn to, assigned as perjury, was material. But this need not be by setting out the testimony. It may be done by an express averment to that effect. (*Pollard v. People*, 69 Ill. 148; *Kimmel v. People*, 92 id. 457.) The averment in this indictment that the false testimony was in a matter material to the issue makes it good, and the preceding allegation, to the effect that it became a material inquiry whether or not the defendant tendered the money to VanVlissingen, may be entirely rejected as surplusage. (1 Bishop on New Crim. Proc. sec. 482.) The technical precision formerly required in indictments for perjury has been, to a considerable extent, dispensed with by the provisions of our statute. (Rev. Stat. chap. 38, sec. 227.)

We also think the evidence, taken as a whole, clearly tended to prove that the alleged false testimony was upon a matter material to the issues between the parties. As stated, the foreclosure proceeding was upon a trust deed given by one O'Donohue and wife to Peter VanVlissingen, trustee, to secure O'Donohue's note for \$56,000,

due in five years, with interest at five and one-half per cent, and ten interest coupons for \$1540 each. The trust deed provided that for a failure to pay any one of the interest notes the trustee might declare the whole mortgage debt due and proceed to foreclose. The defendant claimed to have become the owner of the mortgaged premises. The bill alleged a failure to pay one of the interest coupons then past due, for which default the complainant had elected to declare the principal sum due. The defendant, by his answer, after alleging his ownership of the premises, alleged that he tendered to the trustee, for the use of the holder of the mortgage, the full sum remaining due on said interest coupon, which he had refused to accept. With the answer he brought the money into court, and denied that complainant was entitled to any of the relief prayed. The testimony, to our minds, clearly established the fact that no tender or offer to pay said interest was made by him, but does establish that the defense was a false and fictitious one, gotten up by him and others whom he engaged in the scheme which he attempted to carry out by falsely swearing to the tender. How it can be said, under the issues in this case, that the testimony was immaterial we are unable to perceive. If it had been true and the tender been established by the proof it would certainly have defeated the complainant's right to relief upon the bill.

Criticism is made upon instructions given on behalf of the People, and in the ruling of the court in refusing to give certain instructions asked on behalf of the defendant. Many of the points made upon this branch of the case we can but regard as extremely technical, and do not deem it necessary to say more than from a consideration of the entire charge to the jury we are able to discover no substantial error.

The judgment of the criminal court will be affirmed.

*Judgment affirmed.*

FANNIE F. WEAVER

v.

MARY W. WEAVER.

*Opinion filed October 16, 1899—Rehearing denied December 7, 1899.*

1. **INSURANCE**—*when giving of duplicate assignment to agent is not a delivery.* The delivery of a duplicate assignment of a life insurance policy to an agent of the company does not amount to a delivery to a third person for the benefit of the assignee, when the copy was furnished the agent in compliance with a condition in the policy.

2. **SAME**—*what not a valid gift of insurance policy.* A son who, after executing an assignment of a life insurance policy to his mother as a gift, sends word to her of the fact and that he will keep the policy and assignment for her, does not thereby make a valid delivery of the assignment or deprive himself of the right to make a different disposition of the policy thereafter.

3. **TRUSTS**—*a trust cannot be deduced from a mere imperfect gift.* A trust relation with reference to an assignment of a life insurance policy cannot be said to exist between the assured and the assignee where the gift of the assignment was imperfect.

*Weaver v. Weaver*, 80 Ill. App. 370, reversed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

**ROGERS & MAHONEY**, and **FREDERICK A. WILLOUGHBY**,  
for appellant:

It is essential to the validity of a gift that the donor must be competent to contract; there must be freedom of will; the gift must be complete, with nothing left undone; the property must be delivered by the donor and accepted by the donee, and the gift must go into immediate and absolute effect. Am. & Eng. Ency. of Law, 1313.

Equity will not interfere to perfect a defective or imperfect gift, nor convert such a gift into a declaration of trust merely on account of the imperfection. Am. & Eng. Ency. of Law, 1314.

In order to complete the assignment or gift, delivery, or that which is equivalent thereto, must be made. *Lemon v. Insurance Co.* 38 Conn. 294; *Palmer v. Merrill*, 6 Cush. 282; *Otis v. Beckwith*, 49 Ill. 121; *Williams v. Chamberlain*, 165 id. 210; *Bristow v. Hall*, 16 Tex. 566; *Riseley v. Bank*, 83 N. Y. 318; *Williams v. Guile*, 46 Hun, 645; *Weber v. Christen*, 121 Ill. 91.

In this State an insurance policy is but a chose in action, and governed by the principles applicable to choses in action in general. *Conyne v. Jones*, 51 Ill. App. 17; *Insurance Co. v. Ludwig*, 103 Ill. 305.

There was no trust in this case, either express or implied. *Badgley v. Votrain*, 68 Ill. 25; *Kingsbury v. Burnside*, 58 id. 310; *Stevenson v. Crapnell*, 114 id. 19; *Lantry v. Lantry*, 51 id. 458; 2 Pomeroy's Eq. Jur. sec. 1044; *Biggins v. Biggins*, 133 Ill. 218; *Williams v. Chamberlain*, 165 id. 210; *Clark v. Durand*, 12 Wis. 233; *Perry v. McHenry*, 13 Ill. 236.

HOLDEN & BUZZELL, (WILLIAM H. HOLDEN, of counsel,) for appellee:

Edward L. Weaver made and delivered a formal assignment of the policy. He left nothing undone to complete the gift to his mother. He notified her of the assignment and she accepted the same. Upon his death she could sue and recover, therefore the gift was effectual as a gift *inter vivos*. 8 Am. & Eng. Ency. of Law, 1313, 1314.

The delivery to the insurance company of the assignment to the appellee was a valid and effectual delivery thereof for the use and benefit of appellee. *Fortescue v. Barnett*, 3 M. & K. 41; *Sanborn v. Goodhue*, 28 N. H. 56; *Kerrigan v. Rautigan*, 43 Conn. 23; *Walker v. Walker*, 42 Ill. 311; *Bryan v. Wash*, 2 Gilm. 557; *Otis v. Beckwith*, 49 Ill. 121; *McEwen v. Troost*, 1 Sneed, 191; 33 Tenn. 191; *DeCaument v. Bogort*, 36 Hun, 382; *Hurlbut v. Hurlbut*, 49 id. 189; *Gunnell v. Cockerill*, 79 Ill. 79; *Baker v. Baker*, 159 id. 394; *Wilson v. Wilson*, 158 id. 574; *Shea v. Murphy*, 164 id. 614; *Gannon v. McGuire*, 47 N. Y. Sup. 870; *Cline v. Jones*, 111 Ill. 566; *Tar-*

*box v. Grant*, 39 Atl. Rep. 378; *Walter v. Way*, 170 Ill. 96; *Martin v. Martin*, id. 639.

The gift, being evidenced by deed duly delivered to a third person, is complete. *Fulton v. Fulton*, 48 Barb. 590; *Crabtree v. Crabtree*, 159 Ill. 348; *Miller v. Meers*, 155 id. 294; *Masterson v. Cheek*, 23 id. 73; *Knapstein v. Tinnette*, 156 id. 324; *Folly v. Fautuyl*, 4 Halst. 158; *McElroy v. Hiner*, 133 Ill. 156; *Jaggers v. Estes*, 3 Strobbh. Eq. 379; *Mallett v. Page*, 6 Ind. 364.

In a gift by parol, only, is the delivery of the thing given essential. *Ewing v. Ewing*, 2 Leigh, 343; *Carpenter v. Soule*, 43 Sickels, 257; *Matson v. Abbey*, 70 Hun, 477; *McCutchen v. McCutchen*, 9 Port. 650; *Walker v. Crews*, 73 Ala. 415; *Crawford v. Bertholf*, 1 N. J. Eq. 458; *Bunn v. Winthorp*, 1 Johns. Ch. 329; *Reed v. Douthit*, 62 Ill. 348; *Fulton v. Fulton*, 48 Barb. 590.

In the case of a gift which is valid upon delivery of the assignment, the gift is complete upon such delivery to the debtor, and nothing further is required to enable the assignee to sue for and recover the demand thus assigned. *Williams v. Chamberlain*, 165 Ill. 220; *Shults v. Shults*, 159 id. 660; *Cline v. Jones*, 111 id. 566; *Irons v. Smallpiece*, 2 B. & A. 551; *Bryan v. Wash*, 2 Gilm. 557.

The law presumes more in favor of the delivery of deeds made in the course of voluntary settlements than it does in ordinary cases of bargain and sale. *Winterbottom v. Pattison*, 152 Ill. 334; *Reed v. Douthit*, 62 id. 348.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The parties to this litigation were interpleaders in the circuit court of Cook county upon the petition of the *Ætna Life Insurance Company*, each claiming the benefit of a policy of insurance upon the life of Edward L. Weaver, procured December 20, 1882. He died May 9, 1896, leaving appellant, his widow, and appellee, his mother, surviving him. The policy provided that "no assignment of this policy shall be valid unless made in

writing and attached hereto and a copy thereof furnished said company; and any claim against this company arising under this policy, made by any assignee, shall be subject to proof of interest." On October 8, 1892, about one year after his marriage to appellant, insured went to the office of the company in Chicago and there filled out in duplicate an assignment to his mother, as follows:

"For value received I hereby transfer, assign and turn over unto Mary W. Weaver, mother, all my right, title and interest in policy of life insurance No. 35,856, issued by the *Ætua* Life Insurance Company of Hartford, Conn., and all benefit and advantage to be derived therefrom.

"Witness my hand and seal at Chicago, State of Illinois, this eighth day of October, 1892.

EDWARD L. WEAVER. [Seal.]"

This he acknowledged before a notary public on that day, and left one copy with the agent of the company, and took the other, with the policy, to his home. A short time previous to his death (May 9, 1896,) he made another assignment, to appellant, one copy of which was attached to the policy and delivered by him to her; the other she caused to be delivered to the company some days after his death.

Upon a hearing in the circuit court a finding and decree were rendered in favor of the wife, which, on appeal to the Appellate Court for the First District, was reversed for error in the exclusion of evidence, and the cause was remanded for further proceedings. On a second hearing the chancellor again found for the wife, and entered a decree in her favor, but that decree has been reversed by the Appellate Court and the cause remanded, with directions to enter a decree in favor of the mother. To reverse that judgment the wife prosecutes this appeal.

Both assignments are admitted by all parties to have been intended by the assignor as mere gifts. The contention on behalf of the mother, in the circuit and Appellate Courts and here, is, that the assignment to her was a perfected gift and the power of the insured to thereafter

make an assignment of it exhausted; or, as it is sometimes expressed, after that assignment he was no longer *in loco pœnitentiæ*. And this position, though overruled by the circuit court, has been sustained by the Appellate Court. The correctness of the contention depends upon whether or not there was such a delivery of the assignment as to put the control of it and the policy out of the power of the assignor during the remainder of his life. It is conceded, as clearly it must be, that unless there was such delivery the gift to the mother was not so perfected *inter vivos* as to give it validity as against the second assignment, and, on the other hand, it is not denied that if the first assignment was so far completed as to become a valid and binding gift upon the part of the donor, then the second subsequent gift to the wife is invalid for want of power to make it.

Turning, then, to the vital question in the case, was there a delivery of the assignment of October 8, 1892, to the mother? No controversy is made upon the proposition that an actual, manual delivery was not necessary, but it is admitted by counsel for appellant that a good delivery may be made by acts without words, by words without acts, or by both; that a delivery may be legally made to a third person for the benefit of a grantee, or, as in this case, the assignee. The usual mode of delivery is the mutual transfer from the grantor to the grantee. But it is too well understood to call for the citation of authorities, that the declarations and conduct of the grantor in relation to the instrument may be such as to become equivalent to such actual delivery, and in every such case the crucial test is the intent with which the acts or declarations were made, and that intent is to be ascertained from the conduct of the parties, particularly the grantor, and all the surrounding circumstances of the transaction. (*Weber v. Christen*, 121 Ill. 91.) "Delivery is by words, acts, or both combined, by which a grantor expresses a present intention to divest himself of title to



- property described in a proper deed. No particular form of delivery is required. A deed may be manually given by the grantor to the grantee, yet manual delivery is unnecessary. The real test of delivery is this: Did the grantor, by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered." 9 Am. & Eng. Ency. of Law, (2d ed.) pp. 153, 154,—citing *Weber v. Christen*, *supra*, and other Illinois decisions to like effect.

In *Provart v. Harris*, 150 Ill. 40, (on p. 47 of the opinion,) after citing authorities as to what will constitute a good delivery, we said: "While it may not be essential in all cases that the deed should be delivered into the actual possession of the grantee, (*Gunnell v. Cockerill*, 79 Ill. 79,) it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed pass beyond the dominion and control of the grantor, for otherwise it can not be correctly said to come within the power and control of the grantee. Their interests are diametrically opposed. Both cannot, consistently with its objects, have control of the deed at the same time, and until the grantor parts with all control over it that of the grantee does not attach. (Cases *supra*.) It is absolutely essential that the acts done or words spoken, or both, shall clearly manifest an intention on his part that the deed shall presently become operative to convey the estate therein described to the grantee, and that he has parted with all power of control and dominion over it, (*Bryan v. Wash*, 2 Gilm. 557,) for, as we have seen, if the grantor retains dominion and control over it, the deed is ineffectual for any purpose as a conveyance. In *Cook v. Brown*, 34 N. H. 460, the court, in passing upon this point, there said: "To make the delivery good and effectual the power of dominion over the deed must be parted with. Until then the instrument passes nothing. It is merely ambulatory and gives no title. \* \* \* So long as it is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire

none, and if the grantor dies without parting with his control over the deed it has not been delivered during his life, and after his decease no one can have the power to deliver it.' In *Prutsman v. Baker*, 30 Wis. 644, it was said: "To constitute delivery, good for any purpose, the grantor must divest himself of all power and dominion over the deed. \* \* \* An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is, that there must be a parting with the possession and of the power and control over the deed by the grantor, for the benefit of the grantee, at the time of delivery.' While the doctrine announced in these cases has not been universally adopted, (1 Devlin on Deeds, sec. 283,) it is supported by the great current of authority,"—citing authorities. In *Walter v. Way*, 170 Ill. 96, (on p. 99 of the opinion,) we again said: "It has also been said that a delivery may be by acts or words, or by both, or by one without the other. But it is well settled that several things are necessary to constitute a valid or effective delivery of a deed. One of the essential requisites of a sufficient delivery is, that the deed pass beyond the dominion and control of the grantor,"—citing with approval *Provart v. Harris*, *supra*. To the same effect is *Hawes v. Hawes*, 177 Ill. 409.

Here there is no claim that there was an actual delivery of the deed of assignment to Mary W. Weaver, the appellee, but it is insisted that the leaving of one of the duplicate copies with the agent of the insurance company amounted to a delivery to a third person for her benefit. This position cannot be sustained. We think it clear, from all the facts in the case, that the only purpose of the insured in leaving that copy with the company was to comply with the condition in the policy requiring, in case of an assignment, a copy thereof to be furnished to the company.

The case of *Hurlbut v. Hurlbut*, 49 Hun, 189, relied upon by counsel for appellee as an authority sustaining their

contention on this point, is distinguishable from this case in that particular,—at least there is nothing in the case as reported to show that there was a condition in the policy that the company should be furnished with a copy of any assignment to make it valid. It was perfectly consistent with all the facts in that case to hold that the delivery to the agency of the company was with the intent to presently divest the title of the father and transfer it to the daughter, whereas here it is altogether consistent with the facts that the duplicate was placed in the hands of the agent solely for the purpose of taking one step, made necessary by the policy, to finally consummate the transfer. The declarations of the assured, proved by appellee herself, to the effect that he would retain the policy and assignment for her, are inconsistent with the claim that by the delivery of the copy he intended that a third party should hold it for her benefit. The fact that the copy was executed, acknowledged and left with the company is, of course, a circumstance tending to show, with all the other facts of the case, that there was a purpose, at the time, to make a complete gift to the assignee, but it was not, of itself, a valid delivery. And *Williams v. Chamberlain*, 165 Ill. 210, goes no further than this.

But it is insisted that the acts and declarations of the insured were equivalent to a delivery to the assignee herself. It appears from the testimony of Mr. Snow, a brother-in-law of the deceased, that on the day the blanks were filled up and executed at the office of the company, and after they were completed and a copy left with the agent, deceased directed him to inform his mother that he “had assigned his policy of life insurance in the *Ætna Life Insurance Company*, of \$2000, to her, *and he would keep the policy and assignment for her.*” This witness also testified that that evening, at his house, the mother being present, (she then living with him,) he delivered that message, to which she replied, in substance, that it was very

kind in her son. The wife of Snow, sister of deceased, also testified to the delivery of the message and the reply of the mother. Subsequently all the parties met in California, where the insured resided for a time for his health, and Snow, his wife and appellee all testify to conversations there, some of which were as late as in the winter of 1895, in which the deceased stated that he had assigned the policy to his mother, and she testifies that he at one time told her that he would keep it for her. This testimony, considered most favorably to the appellee, merely amounts to saying that he made the assignment, retained possession of it, and sent word to his mother that he had made it and that he would "keep it for her." There is no evidence in this record to the effect that the assignment was ever attached to the policy, and the proof shows that it was never seen after the assured took it from the office of the company. At the time of the assignment to the wife the policy was found in a tin box in the trunk of the assured, and no assignment was attached to or found with it. Certainly, under the testimony of Snow, his wife and appellee, it cannot be said the assured ever parted with the dominion and control over the instrument, unless it must be held that he did so by the declaration or promise that he would keep it for the assignee.

It has been held that there could be no valid delivery of a deed so long as it remained in the possession and control of the maker. While the rule is not uniform, no case has been found which holds, nor can we conceive that it could be held, that a deed retained by the grantor for the grantee would ever be equivalent to a delivery, unless it was clearly shown that he retained it under such circumstances as would estop him from making any other disposition of it subsequently. That Edward L. retained the physical control of this assignment cannot be questioned. That he had it in his power to destroy it (and we think it fairly inferable that he did do so) is clear. The promise that he would keep it for his mother

was without consideration, the transfer being a mere gift, and no one will claim that she could, at any time, by any means, have compelled the fulfillment of that promise. Had he the next day, or at any time subsequent to the execution of the instrument, seen proper to inform his mother that he had changed his mind and determined not to keep it for her, will it be seriously contended that she could have prevented the carrying out of that determination? If so, upon what principle and by what means? It may be said that, morally, it was wrong that he should deceive her by his conduct and declarations, but he was guilty of no legal wrong for which the law affords a remedy. The charitable view, however, and one not inconsistent with the facts, to our minds, is, that while he at different times had it in his mind to give the policy to his mother, he never understood that he had absolutely done so, and that, putting his own construction on his acts and declarations, he never intended to foreclose himself of the right to leave it to his estate or give it to his wife if circumstances, in his judgment, subsequently justified it. In the very case of *Otis v. Beckwith*, 49 Ill. 121, so much relied upon by counsel for appellee, the assignment was made, the company and assignee (a trustee) notified thereof, and the latter returned to the assignor his written acceptance thereof. The assignor retained the assignment until his death, never in any way indicating a purpose to revoke it, and it was held, after his death, that it was a valid assignment, enforceable in equity, but Chief Justice BREESE, in rendering the opinion, said (p. 141): "We place the most stress upon the first point discussed, and that is the intention of the donor. \* \* \* At no time did he manifest any desire to retract, and though he occupied *locus pœnitentiæ*, he did not repent of his act, but left the world with the conception that those so dear to him had been provided for." If in that case the assignor was, during his lifetime, *in loco pœnitentiæ*, how can it be said here that Edward

L. Weaver was powerless, from the moment he sent the message to his mother, to repent of his act and do as it is conceded he did, with all the formalities and requirements of law and the conditions in his policy, by giving it, as the last act of his life, to his wife?

What we have here said sufficiently disposes of the point that a trust relation existed between the assured and his mother as to the assignment. We have shown that there was no valid delivery, and therefore the gift was imperfect. It was held in *Badgley v. Votrain*, 68 Ill. 25 (on p. 30): "If the trust is perfectly created, so that the donor or settlor has nothing more to do and the person seeking to enforce it has need of no further conveyance, \* \* \* it will be carried into effect, although it was without consideration and the possession of the property was not changed; but if, on the other hand, the transaction is incomplete and its final completion is asked in equity, the court will not interpose to perfect the settlor's liability without first inquiring into the origin of the claim and the nature of the consideration,"—citing authorities. There was much stronger reason for holding that an enforceable trust existed between Williams and his sisters in the case of *Williams v. Chamberlain*, *supra*, but we held that "from a mere imperfect gift a trust cannot be deduced." (See *McCartney v. Ridgway*, 160 Ill. 129, and cases there cited.) As was said in that case on page 153: "A court of equity will not aid a mere volunteer to carry into effect an imperfect gift or an executory trust."

Our conclusion is that the decree of the circuit court was right, and it will accordingly be affirmed and the judgment of the Appellate Court reversed.

*Judgment reversed.*

## THE CHICAGO CITY RAILWAY COMPANY

v.

SOPHIA ANDERSON.

*Opinion filed October 19, 1899—Rehearing denied December 9, 1899.*

1. PLEADING—*when allegation is sufficient to admit proof of plaintiff's employment.* An allegation that because of the injuries received the plaintiff "was and is hindered and prevented from attending to her business and affairs," is sufficient to admit evidence of her frequent employment as nurse and her earnings in that capacity.

2. INSTRUCTIONS—*when instruction does not authorize improper allowance of damages for mental suffering.* An instruction that in estimating the plaintiff's damages the jury may, in connection with her personal injuries, consider her pain and suffering, if any are proved, undergone in consequence of her injuries, if any are proved, is not objectionable, as permitting the allowance of damages for mental pain and suffering endured.

3. APPEALS AND ERRORS—*when remittitur of half amount of verdict is properly required on appeal.* A verdict for \$7000, rendered in an action for personal injuries, is excessive, and is properly reduced, on appeal, to \$3500, by requiring a remittitur, where the plaintiff is a woman fifty-nine years of age, who divided her time between her housework and her employment as a nurse, at which she earned \$12 or \$15 per week, and her injuries, except temporarily, are wholly of a subjective nature.

*Chicago City Railway Co. v. Anderson*, 80 Ill. App. 71, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

WILLIAM J. HYNES, and MARCUS KAVANAGH, for appellant.

WILLIAM C. SCHAEFER, and GEORGE W. PLUMMER, for appellee.

Per CURIAM: In deciding this case the Appellate Court delivered the following opinion:

"The appellee was riding as a passenger, and sat in the front end or north-east corner of one of appellant's

electric cars. When the car was attempting to pass a wagon loaded with lumber going in the same direction, the lumber projecting some feet—six or seven feet, as testified by one witness,—behind the end of the wagon, it ran into the lumber, some pieces of which broke through and into the car and hit appellee in the back, and caused the injuries for which she sued and recovered.

“It would be useless to review the testimony in detail. There is no question made that appellee was not in the exercise of all due and proper care for her own safety. Whether the car was negligently operated by appellant’s servants, as claimed by the appellee, or whether the collision was a mere unavoidable accident occasioned by a sudden shifting of the wagon and load from a safe position to be passed by the car, into the way of the car so suddenly and unexpectedly as to make the collision an unforeseen and unavoidable accident occasioned by an outside force beyond the control and avoidance of the appellant, and for which it was in no manner negligent or responsible, were matters which were fully placed before the jury by the evidence, and we regard their conclusion as clearly justifiable, if not absolutely right.

“Appellant argues that the allegation of the declaration that because of the injuries received appellee ‘was and is hindered and prevented from transacting and attending to her business and affairs,’ is insufficient to admit evidence of appellee’s frequent employment as nurse to women in confinement, and her earnings in such capacity. The rule in this State is, ‘that in order to recover compensation for inability to work at the plaintiff’s ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability caused by the injury, and consequent loss and damage, and that proof of his particular employment or business, and of his ordinary wages or earnings therein, is admissible in evidence under such general averment, but that when it is sought to recover for loss of profits



or earnings that depend upon the performance of a special contract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration.' (*Chicago and Erie Railroad Co. v. Meech*, 163 Ill. 305.) The allegation was sufficient and the evidence properly admitted.

"Objection is made to appellee's instruction numbered 14, because thereby the jury were told that in estimating her damages they might, in connection with her personal injuries, take into consideration her pain and suffering, if any are proven, undergone by her in consequence of her injuries, if any are proved; and the criticism indulged in is, that thereby the jury were permitted to allow damages for any mental pain and suffering suffered by her. The mental pain that comes from the contemplation of a maimed body, and the humiliation of going through life in a crippled condition, is too remote to be considered an element of damage. The mental pain that may be considered and allowed for in this class of cases is such as is the direct result or concomitant of the physical pain suffered. Mental pain is always an attendant upon severe physical pain,—such is the relation of mind and body,—and the mental pain that is the direct and necessary result of the physical pain, but not otherwise, is a proper element of damages in personal injury cases. (*Chicago City Railway Co. v. Canevin*, 72 Ill. App. 81.) The instruction violated no rule of law regarding the element of pain, either mental or physical, suffered by an injured person.

"We feel justified in omitting to discuss the numerous errors claimed concerning other instructions that were given and refused, upon the ground that they present no new or interesting questions, and, as we consider, were properly acted upon by the trial judge.

"The appellee recovered a verdict and judgment for \$7000. This we believe was so excessive as to require a reversal upon that ground alone, unless a *remittitur* be

entered. The appellee was fifty-nine years old. She worked about half of the time in nursing, at wages of from \$12 to \$15 per week, and the rest of the time her work was that of taking care of her own home, her youngest child being seventeen and her eldest thirty-six years of age. Her injuries, except temporarily, were wholly of the subjective sort, and though we were to accept as true her present partial incapacity in consequence of them, still, if they are measured by the only standard we are permitted to employ,—that of compensation,—she ought not to have recovered more than one-half the amount of the verdict that was returned. If appellee will file in this court, within ten days, a *remititur* of one-half the recovery below, the judgment will be affirmed for the balance, at her costs, otherwise it will be reversed and the cause remanded."

The *remititur* was filed, as suggested, and the Appellate Court affirmed the judgment for \$3500.

We concur in the foregoing views expressed by the Appellate Court. Accordingly the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE TOWN OF CICERO

v.

THE CITY OF CHICAGO.

182	301
210	*295

*Opinion filed October 19, 1899—Rehearing denied December 9, 1899.*

1. MUNICIPAL CORPORATIONS—the *Annexation act of 1889 applies to the town of Cicero*. The act to provide for the annexation of cities, incorporated towns and villages, or parts of the same, to cities, incorporated towns and villages, approved and in force April 25, 1889, (Laws of 1889, p. 66,) is applicable to the annexation of a part of the incorporated town of Cicero to the contiguous city of Chicago.

2. SAME—*town of Cicero does not exist under Township Organization law*. The legal existence of the town of Cicero under the Township Organization law was terminated by the special acts of 1867 and 1869, which created the incorporated town of Cicero, and the por-

tion taken therefrom and annexed to the city of Chicago does not remain a part of the town of Cicero under the Township law.

3. *SAME*—county board may annex detached territory to other towns for township government. The county board of Cook county has power, under its general authority, to divide, enlarge or create new towns, conferred by section 1 of article 3 of the Township Organization act, (Rev. Stat. 1874, p. 1069,) to annex territory left out of any township to some other town for the purpose of township government.

4. *SAME*—completed annexation is not affected by subsequent laws. The completed annexation of a part of the territory of an incorporated town to a contiguous city is not rendered illegal by the subsequent passage of a law increasing the area of towns, nor is the county board thereby deprived of the right to add the territory so left without township government to some other town for that purpose.

5. *SAME*—legislature may authorize division of towns without consent of inhabitants. A statutory provision that a part of the territory of a town may, by the vote of a majority of the entire town, be detached from it, is within the legislative power and discretion, which may be exercised by general and uniform law, to divide, alter or abolish townships and incorporated towns without consent of inhabitants.

APPEAL from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

CHARLES S. CUTTING, and GREEN & PRINGLE, for appellant:

The town of Cicero, under its special charter, is indivisible under any existing law. *Martin v. People*, 178 Ill. 611; *Gray v. Cicero*, 177 id. 459; *Cicero v. McCarthy*, 172 id. 279; *Drexel v. Lake*, 127 id. 54; *Ottawa v. LaSalle County*, 12 id. 345; *Covington v. East St. Louis*, 78 id. 552; *Insurance Co. v. Freer*, 97 id. 539; *Andrews v. People*, 75 id. 605; *Chicago v. Packing Co.* 88 id. 221.

Cook county, and every part of it, is under township organization. *Railway Co. v. People*, 83 Ill. 476; *People v. Brisbin*, 80 id. 423.

The city of Chicago has no township powers. General act of 1872, incorporating cities and villages; *Dolese v. Pierce*, 124 Ill. 140.

The annexation of the Austin territory in spite of an adverse vote of its own people is contrary to the policy

of this State as expressed by its legislature. Bradwell's Laws of 1899, p. 89.

No township can be reduced to an area of less than sixteen square miles, hence the Austin territory must remain a permanent part of the township of Cicero. Bradwell's Laws of 1899, p. 285; *Jefferson v. People*, 87 Ill. 506; *Menard County v. Kincaid*, 71 id. 587; *Illinois and Michigan Canal v. Chicago*, 14 id. 334.

CHARLES M. WALKER, Corporation Counsel, GRANVILLE W. BROWNING, (CRAFTS & STEVENS, and E. F. ABOTT, of counsel,) for appellee:

The incorporated town of Cicero is a municipal corporation, like an incorporated city or village. *Martin v. People*, 87 Ill. 524; *Kelly v. Gahn*, 112 id. 23; *Enfield v. Jordan*, 119 U. S. 680; *Greeley v. People*, 60 Ill. 19; *Wilson v. Trustees*, 133 id. 443.

This Annexation law of 1889, under which the annexation of the territory involved in this suit was begun and completed, applies to the incorporated town of Cicero for the annexation of a part of its territory, as well as of the whole thereof, to the city of Chicago. *People v. Morgan*, 90 Ill. 558; *People v. Knopf*, 171 id. 191; *Bruce v. Schuyler*, 4 Gilm. 221; 1 Starr & Cur. Stat. (2d ed.) sec. 219, p. 798; *True v. Davis*, 133 Ill. 522.

The powers granted to municipal corporations are not vested rights but are held subject to the law-making power of the State, and their charters may be amended, changed or repealed at the legislative will. *Trustees of Schools v. Tatman*, 13 Ill. 27; *Lake View v. Rose Hill Cemetery*, 70 id. 191; *Mt. Carmel v. Wabash County*, 50 id. 69; *People v. Harvey*, 142 id. 575; *McCormack v. People*, 139 id. 499; *Dutton v. Aurora*, 114 id. 138.

The act under which this annexation took place has been before this court and upheld as valid and constitutional in the following cases: *McGurn v. Board of Education*, 133 Ill. 122; *Cravener v. Board of Education*, id. 145;

*True v. Davis*, id. 522; *North Springfield v. Springfield*, 140 id. 165; *People ex rel. v. Cregier*, 138 id. 401; *East St. Louis v. Rhein*, 139 id. 116; *Railroad Co. v. Chicago*, 143 id. 641; *Swift v. People*, 162 id. 534; *Swift v. Klein*, 163 id. 269.

All questions raised in this case as to the applicability of said act to the town of Cicero are *res judicata* by virtue of the contemporaneous construction of said act by the officers and people of the town of Cicero, and their acquiescence therein for the past ten years. *Donnersberger v. Prendergast*, 128 Ill. 229; *Bruce v. Schuyler*, 4 Gilm. 221; *People v. Morgan*, 90 Ill. 558; *People v. Knopf*, 171 id. 191.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The superior court of Cook county sustained a demurrer to the bill of complaint of the appellant, the town of Cicero, wherein said town prayed that the appellee, the city of Chicago, should be enjoined from asserting jurisdiction over certain territory which had been within the corporate limits of said town and which the city claimed had been detached from said town and annexed to said city, and also from interfering with the possession by said town of the public property in said territory. The complainant elected to stand by the bill, and the court dismissed it for want of equity.

The facts as alleged in the bill and admitted by the demurrer are as follows: In the year 1857 Cook county was organized under the Township Organization law of this State, and as a county it still remains under said law. The town of Cicero was organized as one of the townships under that law, and included the whole of township 39, range 13, in said county. On February 28, 1867, by an act of the General Assembly, this town was incorporated under the name of the town of Cicero. On February 27, 1869, the legislature, by a special act, disconnected from said town the east two miles thereof, except that part south-east of the Illinois and Michigan

canal, and annexed it to the city of Chicago for municipal purposes proper and to the town of West Chicago for township purposes. On March 25, 1869, the charter of the town of Cicero was revised and amended, and has since continued in the same form. In November, 1887, in pursuance of an election held under the Township Organization law, that part of the town of Cicero south-east of the Illinois and Michigan canal was annexed to the town of South Chicago and another portion was annexed to the town of West Chicago. On April 29, 1889, the same territory detached from the town of Cicero in November, 1887, was annexed to the city of Chicago under the provisions of an act entitled "An act to provide for the annexation of cities, incorporated towns and villages, or parts of the same, to cities, incorporated towns and villages," approved and in force April 25, 1889. Afterward, July 15, 1889, by virtue of proceedings under the same act, another portion was annexed to the city of Chicago, and in November, 1889, the county board annexed the same territory to the town of West Chicago under the Township Organization law. After these portions were detached from it the town of Cicero was left with seventeen and three-fourths square miles of territory. A portion of that territory is locally known as Austin, and contains three and a half square miles and about 10,500 inhabitants. The remainder of the town has about 13,500 inhabitants. The proceeding involved in this case was begun March 17, 1899, by the presentation of a petition to the judge of the county court for the annexation to the city of Chicago of said territory known as Austin. The petition was under the act of April 25, 1889, above mentioned, and an election was called and held in accordance with its provisions resulting in favor of annexation.

The arguments against the decree are, that the town of Cicero, under its special charter, is indivisible under any existing law, and any part of it less than the whole cannot be annexed to any other; that the annexation of

Austin to the city of Chicago, which has no township powers, would not interfere with or interrupt the civil township of Cicero existing under the Township Organization law, and the inhabitants of Austin would participate in the election of the town officers of Cicero, who would also participate in its other municipal affairs, and other absurd conditions would exist; that this territory of Austin cannot be annexed to any other township since the remainder of the township would be less than sixteen square miles, and that it is against the spirit of the law to permit Austin to be voted out of the town of Cicero and into the city of Chicago by the remaining part of the town.

The answer to the first proposition is, that the legislature, by express and plain language, made the act applicable to the incorporated town of Cicero, and had the right to do so. The act provides for the annexation of a part of a town like the town of Cicero, which is contiguous to another incorporated city, to such other incorporated city, and provides for the method of procedure to effect that object. The legislature have plenary power to provide for a change in the political status of this territory and have exercised such power.

We have recently had occasion, in the case of *People v. Martin*, 178 Ill. 611, to consider the nature of the incorporated town of Cicero, and our determination precludes further discussion of that subject. We there held, that prior to the year 1867 it was a town under the Township Organization law, but by the acts of 1867 and 1869, which created the new corporation and conferred upon it all the powers possessed by the town of Cicero as a local agency of the government under the Township Organization law, and also the additional powers needed for the advantage and convenience of its inhabitants and usually possessed by incorporated villages and cities as municipal corporations proper, the provisions of the general law were abrogated. Our decision was, that these

acts operated to terminate the legal existence of the town of Cicero under the Township Organization law, and that it ceased to exist as a corporate entity under that law. The corporation thereafter existing and exercising the local powers of government within the territory was the incorporated town of Cicero chartered by the said enactments. Now it is claimed that if a part of its territory is taken from it, such territory will remain a part of the town of Cicero under the Township law. It seems to be thought that as to this territory the township government, which was abrogated and terminated by the acts of 1867 and 1869, has continued in existence, and if the territory is taken from the town of Cicero it will arise from its dormant condition in some mysterious way, or that, contrary to the decision in *People v. Martin*, there have been two corporations acting in conjunction and exercising jurisdiction over the town of Cicero, which will become separated by the annexation to the city of Chicago, and one of the constituent elements or corporations still retains jurisdiction over the territory. Out of this supposition counsel evolve many curious problems and anomalous situations, but when that factor of each of them is removed the consequent difficulties go with it. There is not, and has not been since the passage of the special acts of 1867 and 1869, any other corporation than the incorporated town of Cicero exercising municipal or township powers over this territory. That town is not an amalgamated township and incorporated town, but is a single corporation in itself. It is true that the incorporated town has the powers and performs the functions which are possessed and performed by the *quasi* municipal corporations known as towns under the Township Organization law, but it cannot perform such functions outside of its own territory, and when territory has ceased to be a part of it its powers do not extend over it. When this territory was detached from that corporation it was no longer a part of it for any purpose, and the municipal



franchise could not extend over it or operate within it for township or other purposes. By the annexation the territory becomes subject to the municipal powers of the city of Chicago, but that city, unlike the town of Cicero, does not exercise the powers of township government, and as it cannot exercise such powers this territory is left without township government. It is the design of the law that it should be brought within such township government, and it is the duty of the county board to annex it to some township organization for that purpose. The county board of Cook county has power and jurisdiction to alter the boundaries of towns, to change town lines, and to divide, enlarge or create new towns in that county to suit the convenience of inhabitants residing therein. (Rev. Stat. art. 3, chap. 139, sec. 1, and chap. 34, sec. 57.) There are certain conditions under which the county board is compelled to make alterations when requested by a certain number of residents in a territory of a certain size, but if it should happen, as it has in this case, that territory is left out of any township, there can be no doubt of the power of the county board, under its general authority, to annex it to some other town.

The next point is, that the annexation is illegal because an act was passed on April 10, 1899, after the annexation, which would be in force July 1, 1899, providing that no township should be created containing a territory of less than sixteen square miles, and there would be left an area of only fourteen and a fourth square miles in the remaining town of Cicero. At the time this annexation took place the territory required for a new town was not less than ten square miles, and the town of Cicero contained more than that, so that there was no violation of the law in that respect. The fact that a law was afterward passed and would be in force in the future raising the area from ten to sixteen square miles would not render the annexation illegal. It is said, however, that if the county board of Cook county should act in the mat-

ter after July 1, 1899, it would be governed by the new law. The county board would not be called upon to act with relation to the town of Cicero in any manner. The territory in question was taken from the town of Cicero April 4, 1899, before the law raising the area was enacted or in force, and the town was left with its reduced area as a completed transaction. The county board, by adding this territory, which was left without township government, to some other town, would not create a new town with less than the required area.

The last argument, that there is injustice and inequity in a law which permits the territory known as Austin to be ejected and put out of the town of Cicero by a vote of the whole town, is one which cannot appeal to the courts. Townships and incorporated towns are created at the pleasure of the legislature, and they have no vested rights. The legislature have supreme power over them, and may divide or alter them or detach property from them, or even abolish them, at the legislative pleasure, subject only to the restraint of the constitution that the power shall not be exercised by local or special law, but shall be by general and uniform law. (Dillon on Mun. Corp. sec. 30; *Coles v. Madison County*, Breese, 154.) Such corporations are subject to the legislative control, and may be changed, modified, enlarged or destroyed by general law, to meet the legislative judgment of the public welfare. (*People v. Power*, 25 Ill. 187; *True v. Davis*, 133 id. 522; *Town of Somonauk v. People*, 178 id. 631.) It was within the legislative power and discretion, at the time, to enact such a charter as that incorporating the town of Cicero, (*Greeley v. People*, 60 Ill. 19,) and it was within its power to enact the law by which it has been divided and territory taken from it. The legislature may obtain the consent of the people in the locality to be affected, or not, as they may deem best, and the question whether the consent of a majority in the territory to be annexed or the consent of the whole town shall be required is one which ad-

dresses itself solely to the legislature. It is not, as a matter of law, essential that any consent should be obtained, and all that the legislature have required is that the majority of the entire town to be affected should vote for the annexation.

The facts alleged in the bill and admitted by the demurrer do not constitute any ground for relief, and we approve of the action of the court in sustaining the demurrer and dismissing the bill.

The decree is affirmed.

*Decree affirmed.*

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EDMUND FURTHMAN

v.

JOHN McNULTA, Receiver.

*Opinion filed October 13, 1899—Rehearing denied December 8, 1899.*

1. **APPEALS AND ERRORS**—*when record of order appealed from is not sufficient.* The requirement of section 72 of the Practice act, that the record of an order appealed from shall be filed in the Appellate Court by the second day of the term, is not satisfied by filing a certified copy of the order and appeal bond, without the process, pleadings or orders made in the cause; and unless the time for filing the record is extended for cause shown, the attempted appeal is properly dismissed.

2. **SAME**—*leave to file complete record cannot be had while order dismissing appeal is in force.* While an order dismissing an appeal because of the appellant's failure to file the entire record remains in full force, the court is without power to grant the appellant leave to file the remaining portion of the record.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

EDMUND FURTHMAN, *pro se.*

JAMES M. PROUDFIT, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The appellant sought an appeal from an order entered in the superior court of Cook county in a proceeding instituted on motion of the purchaser of certain premises under a foreclosure decree to obtain a writ of assistance to enable such purchaser to obtain possession of the premises from appellant.

Under the provisions of section 72 of the Practice act the record of the order should have been filed in the Appellate Court for the First District on the second day of the March term, 1899, thereof. The appellant filed in that court on that day a certified copy of the order entered by the superior court and a certified copy of the appeal bond approved by that court. The record of the order, within the meaning of said section 72, included the process, pleadings, orders of the court, etc., in the cause. (*Vail v. Iglehart*, 69 Ill. 332.) That which was filed did not constitute a "record of the order," nor was any motion entered on said second day of the said term for an extension of time, for cause shown, in which to file the record of the order appealed from. On the fourteenth day of April, 1899, no further steps having been taken, the Appellate Court dismissed the appeal. We have frequently ruled that in such state of the record the attempted appeal should be dismissed. (*Adams v. Robertson*, 40 Ill. 40; *Cook v. Cook*, 104 id. 98; *Patterson v. Stewart*, 104 id. 104; *Gadwood v. Kerr*, 181 id. 162.) It was not error to deny the motion of appellant, presented after the entry of the order of dismissal, for leave to file the remaining portion of the record. No motion was entered or reason suggested for the vacation of the order of dismissal. That order standing in full force, deprived the court of power to take further action in the case.

The judgment is affirmed.

*Judgment affirmed.*

## THE VILLAGE OF HINSDALE

v.

EDITH H. SHANNON.

*Opinion filed October 25, 1899—Rehearing denied December 9, 1899.*

1. PUBLIC IMPROVEMENTS—*when sewer ordinance sufficiently locates catch-basins.* An ordinance for the construction of a sewer is not void for uncertainty in the location of the specified number of catch-basins provided for, where they are to be located on the curb lines of the street, at such points as the engineer shall direct.

2. SAME—*sewer ordinance need not describe imbedded stringers to which plank foundation for catch-basin is to be spiked.* The failure of an ordinance for the construction of a sewer to describe the imbedded stringers to which a plank upon which the catch-basins are to be built is to be spiked does not affect its validity.

3. SAME—*caption of sewer ordinance need not refer to matter of house connections.* The caption of an ordinance for the construction of a sewer need not state that the purpose of the ordinance is in part to provide for house connections with the sewer.

4. SAME—*one ordinance may provide for several unconnected sewers of same kind.* The construction of sewers may be provided for as a single improvement in one ordinance when they are to be made of the same material and in the same way, although they do not actually connect with each other.

5. SPECIAL ASSESSMENTS—*assessment is not necessarily void because first installment is over twenty-five per cent of total.* An assessment for a sewer is not necessarily void because its first installment contains more than twenty-five per cent of the total assessment, where the ordinance requires it to be divided into five installments, the first of which shall be, as near as may be, twenty per cent of the assessed amount, and include all fractional amounts, leaving the remaining installments equal in amount and multiples of \$100.

6. COURTS—*Supreme Court takes judicial notice of names of county judges.* The Supreme Court will take judicial notice of who are the judges of the county courts of the State.

7. APPEALS AND ERRORS—*when bill of exceptions is good although signed by the successor of trial judge.* A bill of exceptions will not be stricken from the files although signed by the successor of the judge before whom the case was tried, when the motion to vacate the judgment and for a new trial was continued from term to term, until finally overruled by such successor.

APPEAL from the County Court of DuPage county; the Hon. JOHN H. BATTEN, Judge, presiding.

On the 19th day of June, 1895, the president and board of trustees of the village of Hinsdale passed an ordinance for the construction of a sewer in Third street, in said village. By the ordinance James A. Blood, C. A. Allen and Horace W. Cowles were appointed commissioners to make an estimate of the cost of said proposed improvement, including labor, material and all other expenses attending the same, and cost of making and levying the assessment therefor. The commissioners so appointed made a report in writing to the president and board of trustees, estimating the total cost of said improvement at the sum of \$1775. This report was duly adopted and approved by the president and board of trustees of said village, and the president of said village was directed to file a petition in the county court of DuPage county, Illinois, for proceedings to assess the estimated cost of the improvement.

On the 29th day of June, 1895, appellant, by its president, filed its petition in said county court, reciting in said petition the ordinance for said improvement and the report of the said commissioners, and prayed that the said improvement might be assessed in the manner prescribed by law. Commissioners were appointed and qualified, who made and filed their assessment roll as required by law, together with affidavits of mailing and posting notices and certificates of publication. Appellee filed numerous objections, and by the judgment of the court one of said objections was specifically sustained, to-wit, that the first installment of the assessment contains more than twenty-five per cent of the total of said assessment, and the court added: "It is therefore ordered and adjudged by the court that the objections of Edith H. Shannon filed herein to the confirmation of the assessment be sustained and judgment of confirmation is refused,"—to which the petitioner excepted and prosecutes an appeal to this court.

LINUS C. RUTH, for appellant.

CHILDS & HUDSON, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

At the hearing of the legal objections it was contended that the ordinance was void because the location of the catch-basins is uncertain. The provision of the ordinance concerning the location of the catch-basins is as follows: "Eleven catch-basins shall be constructed and connected with the aforesaid sewer by nine-inch vitrified tile-pipe, each connection being provided with a trap. The basins shall be located on the curb lines of said street, at such points as the engineer in charge shall direct." Then follows a detailed description of the construction of said basins. In *Walker v. People*, 166 Ill. 96, it was said: "It is said that the ordinance should specify at what points the man-holes and catch-basins are to be placed,—that the designation 'at necessary points' is too indefinite to meet the requirements of the statute. This precise question has been frequently before this court, and the rule laid down in the decisions is adverse to the contention here made by appellant,"—and numerous authorities are there cited as sustaining that proposition. It was further said: "That the ordinance under consideration is not open to the objection made to it is manifest. The number, each, of man-holes and catch-basins, the dimension, materials, etc., are specifically mentioned therein. This is sufficient." The objection here made is not tenable.

It is further contended by appellee that the ordinance for the catch-basins, after giving the size, material and manner of construction, provides they shall be built upon a bottom of two-inch pine plank, firmly spiked to imbedded stringers; and it is urged that because the stringers are not described the ordinance is void. It is not con-

templated by the statute that an ordinance of this kind should set forth all the details of the work to the extent as sought to be raised by this objection. Such a construction would be so narrow and hypercritical that it would, in effect, prevent all improvements by special assessment, and such an objection cannot be sustained. *People ex rel. v. Sherman*, 83 Ill. 165; *Pearce v. Village of Hyde Park*, 126 id. 287.

Appellee contends that the ordinance does not authorize the assessment as made, because the caption of the ordinance does not specify anything in reference to house connections. Said caption is in the words and figures following: "An ordinance for the construction of a tile-pipe sewer in Third street, from a connection to be made with the Vine street sewer east to a point one hundred eighty (180) feet east of the east line of Grant street; also, from a connection to be made with the Lincoln street sewer east to a point one hundred sixty-five (165) feet east of the east line of Lincoln street, and from a connection with the extended stub at the west line of Garfield avenue west to a point two hundred fifty (250) feet west of the west line of Garfield avenue, with man-holes and catch-basins complete, in the village of Hinsdale, DuPage county, Illinois." Section 1 of the ordinance is with reference to the construction of the sewer, and also provides for catch-basins to be constructed, and it is insisted that the ordinance, by its caption, should refer to the necessity of the construction of house connections. The sewer, catch-basins, man-holes and house connections are all parts of one improvement authorized by the ordinance. No provision of the statute requires a description of the nature, character and locality of the improvement to be stated in the caption of the ordinance. The ordinance is clearly sufficient, and is not rendered uncertain by reason of the caption failing to state that its purpose was in part to provide for house connections with the sewer. Nothing said in *Smith v. City of Chicago*,



169 Ill. 257, requires the caption to specify the nature and character of the improvement. This objection is not well taken.

It is contended by the appellee that the ordinance provides for a double improvement. One of these sewers has house connections and the other two have not, and it does not appear that there is actual connection or physical contact of these sewers, one with another. They were all to be made of the same material and in the same way. It was held in *City of Springfield v. Green*, 120 Ill. 269, with reference to the pavement of two or more streets in one scheme (p. 274): "They were all to be paved with the same material and in the same way, and the fact that there was a difference of a few feet in width of some of them, and that the cost of paving the railway tracks in others was to be excluded from the estimate, should, in our opinion, make no difference in this respect. The similarity of the improvement proposed to be made, and the situation of the property to be assessed, with respect to it, afford a more satisfactory test as to whether they might all be embraced in a common scheme as one improvement, than their actual connection or physical contact with one another." It was similarly held in *Haley v. City of Alton*, 152 Ill. 113. The principle applied in the cases last named was applied to a system of sewerage in *Drexel v. Town of Lake*, 127 Ill. 54. We hold the city might provide for the entire improvement in one ordinance.

Appellee contends that the report of the persons alleged to have been appointed to make an estimate of the improvement was not made as required by law, and was made before the ordinance was passed or the persons appointed. We find nothing in the record to sustain this contention.

Other objections are argued by appellee which we deem it unnecessary to notice, and we might well have disregarded those heretofore. One of appellee's objections was that the assessment was void because the first

installment of the assessment exceeds twenty-five per cent of the total amount of the assessment. The judgment of the court was as follows: "And now again, on the 4th day of May, 1896, it being one of the days of the May term, 1896, of said court, this cause coming on to be heard on the motion of petitioner to overrule all legal objections filed herein by Edith H. Shannon to the confirmation of said assessment, except such as are triable by jury, and the court having heard the evidence offered by the respective parties to this proceeding and the arguments of counsel, and the court being advised in the matter, the court finds that the first installment of the said assessment contains more than twenty-five per cent of the total of said assessment. It is therefore ordered and adjudged by the court that the objections of Edith H. Shannon, filed herein to the confirmation of said assessment, be and the same are hereby sustained, and that judgment of confirmation against the premises of said objector be and the same is hereby refused." The ordinance provides that the first installment shall be, as near as may be, twenty per cent of the amount of the assessment, and shall include all fractional amounts, leaving each of the remaining installments equal in amount and multiples of \$100, and provides further that there should be five installments. This question has been before this court and has been adjudicated contrary to the contention of appellee, and that objection is not well taken. *Lapham v. Village of Wilmette*, 168 Ill. 153; *Parker v. Village of LaGrange*, 171 id. 344.

The above is the only judgment of the court with reference to objections filed by appellee, and inasmuch as the objections are not passed on by number but only as stated in the judgment, it is practically a judgment on but one exception. There were no cross-errors assigned, and we might have well refused to consider any other exceptions than the one specifically referred to in the

judgment. We have, however, elected to consider other objections herein.

A motion is made to strike the bill of exceptions from the files. The hearing in this case was had November 5, 1895, and the judgment was entered May 4, 1896, which is the judgment hereinbefore recited. On the 22d day of May, 1896, appellant, by its attorney, filed its motion to vacate and set aside this motion and for a new trial. Judge Brown, before whom the same was tried, went out of office as county judge and was succeeded by John H. Batten, who overruled the motion to set aside the judgment and for a new trial and signed the bill of exceptions in the case. The court will take judicial notice of who are the judges. The legal effect of the motion entered to set aside the judgment and grant a new trial, which was continued from term to term until the same was finally overruled, was to stay a final judgment until such motion was overruled. (*People ex rel. v. Gary*, 105 Ill. 264.) When the motion for a new trial was so finally overruled the judgment became final, and a bill of exceptions could then be tendered to be signed by the judge. (*Hearson v. Graudine*, 87 Ill. 115.) The judge who succeeded the trial judge, and who, in whatsoever manner, became convinced of the correctness of the record and bill of exceptions presented to him, should have signed the same. He had the right to use such means to determine the correctness of the bill of exceptions as he might deem proper. It was his duty to sign a bill of exceptions. (*People ex rel. v. Higbee*, 172 Ill. 251.) The motion to strike the bill of exceptions from the files is overruled.

The court erred in sustaining the exception on the ground that the first installment of the assessment contains more than twenty-five per cent of the total assessment. The judgment of the county court of DuPage county is reversed and the cause remanded.

*Reversed and remanded.*

JOSEPH R. DUNLOP

v.

BENJAMIN B. LAMB.

*Opinion filed October 16, 1899—Rehearing denied December 8, 1899.*

182	819
91a	*508
182	819
198	*440

1. **WITNESSES**—*section 2 of Evidence act applied.* Defendant to a suit brought by an heir of his deceased wife to compel compliance with an ante-nuptial contract is incompetent, under section 2 of the Evidence act, to testify in support of the allegations of his cross-bill concerning acts and declarations of the wife relied upon as showing the contract was inoperative.

2. **EVIDENCE**—*possession of written instrument is prima facie evidence of delivery.* Possession of a written agreement by a party thereto after its execution by the other party raises a presumption of delivery, which can only be overcome by clear and satisfactory proof.

3. **CONTRACTS**—*ante-nuptial contract must be clear to deprive parties of marital rights.* The marital rights of a husband or wife in the estate of the other will not be taken away by an ante-nuptial contract unless the intention to do so is clearly apparent from the contract, the terms of which should be construed not only with reference to its general scope and purpose, but to the circumstances surrounding the parties at the time it was made.

4. **SAME**—*ante-nuptial contract construed as barring husband's rights in wife's property.* A provision in an ante-nuptial agreement that the husband will not claim any right in the wife's property, and will, upon request, execute any deed which may be deemed necessary to more effectually bar or extinguish any right of dower, homestead or inheritance in the estate of the wife, is not ambiguous, but clearly manifests an intention to relinquish all claim to the wife's estate, even though not conveyed by her before death.

5. **SAME**—*extent to which recital in agreement may be resorted to in its construction.* A recital in an agreement may be resorted to where the words in the operative part of the agreement are of doubtful purport, but cannot control their clear intent and meaning.

6. **PARTIES**—*when complainant in bill to enforce ante-nuptial contract is not a mere volunteer.* A collateral heir of a deceased wife is not a volunteer, outside of the influence of the consideration of marriage, upon which a marriage settlement was based, but may ask enforcement of the ante-nuptial agreement in a court of equity, where the husband contracted for himself and his heirs with the wife and her heirs and relinquished all claim to her estate.

**APPEAL** from the Circuit Court of Cook county; the Hon. EDMUND W. BURKE, Judge, presiding.

WILLIAM P. BLACK, GOODRICH, VINCENT & BRADLEY,  
and N. H. HANCHETTE, for appellant.

BENTLEY & BURLING, and CHARLES C. WALKER, for  
appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee filed his bill in chancery in the circuit court of Cook county, as the nephew and sole surviving heir of Mrs. Eureka C. Story Dunlop, deceased, against appellant, to compel him to execute a deed of release of dower and to real and personal estate of deceased, and also to enjoin him from in any manner asserting any rights, as husband, widower, heir-at-law or next of kin, in her estate. The bill was based upon the following agreement:

"This agreement, made this fourth day of August, A. D. 1890, between Joseph R. Dunlop and Eureka C. Story, both of the city of Chicago and State of Illinois:

"*Witnesseth:* That, whereas, a marriage is intended shortly to be solemnized between the said parties, in view of which they desire to provide that the entire estate, real, personal and mixed, including all property of every kind, nature and description now belonging to or which may hereafter be acquired by the said Eureka C. Story, shall be possessed, enjoyed and disposed of by her the same as if she were sole and unmarried and without the help or hindrance of the said Joseph R. Dunlop, her husband:

"Now, therefore, in consideration of said intended marriage and for the purpose aforesaid, the said Eureka C. Story shall continue to possess and enjoy said entire estate, with power to control, manage and dispose of the same, absolutely or conditionally, by deed, will or otherwise, notwithstanding her coverture, without help or hindrance of the said Joseph R. Dunlop, the same as if she were sole and unmarried. And the said Joseph R. Dunlop, for the consideration aforesaid, hereby covenants and agrees with the said Eureka C. Story that he will in no manner disturb the said Eureka C. Story in the possession, enjoyment, disposition, control and power herein provided for. And the said Joseph R. Dunlop, for himself, his heirs, executors, administrators, devisees and assigns, covenants and agrees with the said Eureka C. Story, her heirs, executors, administrators

and assigns, that he will not, at any time, claim any right in any of the aforesaid property as husband, widower, heir or next of kin; and he further agrees to execute, upon request, any deed which may by counsel be deemed necessary more effectually to bar or extinguish any right of dower or homestead or of inheritance in the estate of the said Eureka C. Story. It is mutually agreed that this contract shall be null and void unless the contemplated marriage relations shall be consummated.

"In witness whereof the parties hereto have hereunto signed their names and affixed their seals the day and year above written.

JOSEPH R. DUNLOP,  
EUREKA C. STORY."

The defendant, admitting the execution of the agreement but denying that it ever became operative between the parties, filed a cross-bill, alleging that it was not to take effect until Mrs. Dunlop had executed a like release of her interest in his estate, and praying for an accounting by the complainant, Lamb, as to her estate, and for an injunction restraining him from disposing of the personalty, and for partition of the real estate. The answer also averred that there never was any agreement or intention between the parties that the paper relied upon by complainant should be operative to bar the rights of the defendant, Dunlop, unless in the event of some affirmative action taken by the wife in the matter of the disposition of her estate, real and personal, and that no such action was taken by her at any time, and hence the defendant's marital rights were wholly unaffected by the contract. It admitted the heirship of complainant, as alleged in the bill, and that after the death of Mrs. Dunlop a quit-claim deed to her real estate and a covenant barring the defendant from claiming any right in her estate, deemed necessary by complainant's counsel, was presented to the defendant for his execution, and that he refused to execute the same.

The cause was heard on bill, cross-bill, answers and replication and proofs, and a decree rendered granting the prayer of the original bill and dismissing the cross-bill. Appellant prosecutes this appeal.

Three principal propositions are relied upon to reverse the decree below: First, that the contract set up in the original bill and relied upon for the relief therein prayed was never delivered to Mrs. Story, and that it never was intended by the parties to become binding upon appellant for want of the execution of a similar contract in his favor, as alleged in the cross-bill; second, that by a proper construction of the contract appellant did not release his interest in the wife's estate which might remain intestate upon her death, but only that she might continue to possess, enjoy, control, manage and dispose of her property during the marriage relation as if she were unmarried, free from any interference or assistance on his part; third, that even though the contract was effective between the parties and amounted to a relinquishment of all his right in her estate during or after the termination of the marriage relation, still appellee is to be treated as a mere volunteer, and not entitled in a court of equity to the relief prayed.

On the first proposition the only contention in the argument is, that the evidence introduced on the part of appellee failed to prove a delivery of the alleged agreement to Mrs. Dunlop during her lifetime. All questions raised by the cross-bill are virtually conceded to be out of the case for want of competent proof to establish its allegations. Dunlop, the defendant in the original bill and complainant in the cross-bill, was the only witness by whom it was sought to prove these allegations, and he being a party to the suit and interested in the result thereof, and appellee suing as the heir of Mrs. Dunlop, deceased, by the express provisions of section 2 of chapter 51, entitled "Evidence," (Starr & Cur. Stat.—1st ed.—p. 1072,) he was incompetent to testify to any acts or declarations occurring or made prior to the death of the deceased. There is therefore no question but that the circuit court properly dismissed the cross-bill.

On the question of delivery raised by the answer, it is to be remarked that the contract was not such a one as that a formal delivery was necessary in order to give it validity, as in the case of deeds to real estate, etc. Of course, if it was not delivered because the parties did not intend that it should take effect from its execution, it would not be binding upon them or either of them; and perhaps that is what is meant by counsel in their insistence that it was invalid for want of delivery. We think, however, that, in any view of the question of delivery, the evidence introduced by appellee upon that subject sufficiently established the fact. He was in possession of the contract upon the hearing and introduced it in evidence. He proved that he took it from a safety box of Mrs. Dunlop after her death. This testimony is discredited by counsel for defendant, for the reason that it is contradicted by the officers or employees of the bank where the safety box was kept, and largely because appellee did not himself testify as to his getting it from that box, but relied solely upon the testimony of a witness who swore that he went to the bank with appellee and saw him take the contract from the vault. There is an irreconcilable conflict in the evidence of this witness and those in charge of the safety vault as to the hour of the day when the box was opened and its contents taken away; but as to the fact that appellee was at the bank with another person (presumably the witness) the day after Mrs. Dunlop's death, and caused the safety box to be broken open, removing the contents, including this contract, there is no contradiction. And while it may be said that appellee acted with undue haste in the matter of procuring the opening of the box and in taking possession of the effects of his aunt after her death, we are unable to see how it can be said, in the absence of all proof to the contrary, that he did not find the instrument in the manner claimed. That he had possession of it is not denied. How he obtained that possession, if not in



the manner claimed by him, is wholly unexplained. In fact, it is shown with reasonable certainty that he did not get it from Judge Trumbull, who prepared it and in whose presence it was executed, and with whom appellant says it was left at the time. The only affirmative proof offered on the question of delivery shows that it was in the possession of Mrs. Dunlop at the time of her death, and under all the authorities that possession raised a presumption of delivery, which could only have been overcome by clear and satisfactory proof. (*Reed v. Douthit*, 62 Ill. 348; *Tunison v. Chamblin*, 88 id. 378; *Griffin v. Griffin*, 125 id. 430.) In fact, this ground of reversal is not seriously insisted upon.

We think it clear that the merits of the case turn upon the question whether, by the terms of the contract, appellant relinquished his rights, as husband of the deceased, in her intestate estate. That the marital rights of a husband or wife in the estate of the other will not be taken away by an anté-nuptial contract unless the intention to do so is clearly apparent from the contract, as contended by counsel for appellant, may be conceded. It is not a matter of controversy that in the construction of such contracts the general rule is, that the intention of the parties as ascertained from the whole instrument must govern. That rule is well stated in the quotation made by counsel for appellant from Jones on the Construction of Contracts, (secs. 218, 221,) as follows:

"Sec. 218. While courts strive to give effect to every clause of a contract, they do this upon the assumption that the parties have used all the language of the contract intelligibly and for specified reasons. When, therefore, a consideration of the whole contract discloses the fact that words have been used carelessly or unknowingly, and when the writing, viewed in the light of circumstances, shows that one clear intent was in the minds of the contracting parties and that the difficulty is only with the expression of this intent, the reason for giving

a precise meaning to each clause altogether fails. It has been said that an agreement always 'ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent;' and we have seen that the whole aim of construction is the discovery of the thought of the contract. If, then, upon a consideration of the whole agreement, it is reasonable to conclude that the intent of the parties is clearly ascertained, the law interprets the contract pursuant to such intents.

"Sec. 221. \* \* \* Thus, to carry out the intention, words may be transposed, rejected or supplied if necessary, and every part of the contract will be made to yield to the one general intent which is expressed therein."

Beach, in his work on the Modern Law of Contracts, (sec. 1299,) speaking of marriage settlements, says: "Reason and authority both favor a liberal construction of these contracts. Their purpose is to prevent strife, secure peace, adjust rights and settle the question of marital rights in property. From the earliest years of the law the courts in chancery, rejecting the iron rules of the common law, have favored such contracts, and this rule of equity has been engrafted in the body of American jurisprudence. The cardinal rule by which all such contracts are measured and construed is the intention with which the parties contracted, and in seeking this, the courts look not only to the letter of the instrument, but also to its general scope and purpose, and to the conditions, situation and surrounding circumstances attending the parties at the time the agreement is made." It was also held in *Tabb v. Archer*, 3 H. & M. 398 (3 Am. Dec. 657): "The intention of the parties in marriage articles should be collected from the nature of the agreement, the language and context, the usage in such cases, and the legal

rights of the parties as they existed before and would have existed after the marriage if no agreement had been made."

The facts bearing upon the construction of the agreement in question are as follows: Mrs. Story was the widow of the late Wilbur F. Story, possessed in her own right of personal property variously estimated at from \$120,000 to \$350,000, and a comparatively small amount of real estate, of the value of perhaps \$15,000. She had never been the mother of children, and was, at the time of the making of this contract, at a period in life when there was no longer a hope or expectation of bearing children. Dunlop was a man of some forty years of age, and, as is claimed by him, possessed of a large fortune. As before stated, the contract was drafted by the late Judge Lyman Trumbull,—as the evidence shows, at the request of both parties, the services being paid for by Mrs. Story. A casual reading of the contract will show that two purposes were in the minds of the parties when it was entered into: First, (by the recital and two immediate stipulations,) that the wife should have the possession, enjoyment and power of disposition of her entire estate during the marital relation, free from interference on the part of the husband; and second, (by the third clause,) that the husband would not, at any time, claim any right in any of her estate as husband, widower or next of kin to her, and that he would, upon request, execute any deed deemed necessary more effectually "*to bar or extinguish any right of dower or of homestead or of inheritance in the estate of the said Eureka C. Story.*"

While it is earnestly contended that there is some ambiguity or uncertainty in this last clause, as manifesting an intention on the part of the husband to relinquish all claim to any part of her estate not disposed of during her lifetime, we think its language to that effect is too clear to admit of doubt. In reaching this conclusion we do not attach particular importance to the use of the

words "her heirs, executors, administrators and assigns," except as indicating his intention to dispose of his interest in property which she might own at her death. No ambiguity arises from the use of those words from the fact that in the absence of the agreement the husband would be one of her heirs, because, as we view the contract, one of its objects was to forestall and cut off his rights as such heir. As was said in *Charles v. Charles*, 8 Gratt. 486 (56 Am. Dec. 155): "The rights of the husband to the property of his intended wife may be anticipated by his agreement to that effect, and where by express contract, for which the marriage is a sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture and his right to take as survivor, there remains nothing to which his marital rights can attach during the coverture or after the death of the wife. In such case the wife is, to all intents, to be regarded as a *feme sole* in respect to such property, and there would seem to be no necessity for any limitation over to her next of kin in the event of a failure to appoint during her lifetime. The husband having by contract, for a good consideration, released his right as survivor, the property must pass as though she had died sole and intestate." Certainly, Mr. Dunlop's agreement to claim no right in any of her property, as widower, heir or next of kin, and, if necessary to give effect to that agreement, to execute a release so as to bar or extinguish any right of dower or of homestead or of inheritance in her estate, could mean nothing else than an anticipation and relinquishment of all right which he otherwise would acquire in her estate by the contemplated marriage. Under appellant's contention this third clause adds nothing to the force of the agreement; and it is scarcely conceivable that a lawyer of the eminent ability of Judge Trumbull should have added it to the preceding clauses, if, as is contended, the only object of the parties was to leave the wife in the possession and

control of her property with the power of disposition while she lived. Neither can it be supposed that in view of her rights, under our statute, as to her separate property, a contract would have been drawn for the mere purpose of giving her the rights here insisted upon. Certainly, as to all the personal estate these rights were as amply secured and protected by the statute without such an agreement as with it; and as to the real estate, the contract as construed would serve no other purpose than to obligate him to release his inchoate right of dower and homestead in case she desired to convey or dispose of it by deed or will.

If we take the several clauses of the contract, without reference to the introductory part of it, under the most favorable view to appellant it must, we think, be conceded that two intentions are manifested: First, to give her the absolute control and right of disposition of her property during her lifetime, without help or hindrance of the husband; and second, to relinquish on his part all claim of right to her entire estate. These intentions are in no way conflicting but perfectly consistent with each other. Can it be fairly said that the language in the recital, "in view of which they desire to prove that the entire estate, real, personal and mixed, including all property of every kind, nature and description, now belonging to or which may hereafter be acquired by the said Eureka C. Story, shall be possessed, enjoyed and disposed of by her the same as if she were sole and unmarried, and without the help or hindrance of the said Joseph R. Dunlop, her husband," should be given the effect of limiting the entire agreement, including the third clause, to the mere right of the wife in her property while she lived? This recital is not a necessary part of the agreement, nor does it assume to state the whole and only purpose of the contract. Of course, it is properly to be considered in connection with the obligatory parts, but cannot be held to control the clear intent and meaning of the third

clause. We said in *Burgess v. Badger*, 124 Ill. 288 (p. 293): "It is the rule, as contended by counsel for plaintiff in error, that where the words in the operative part of an instrument are of doubtful meaning, the recitals preceding the doubtful part may be used as a test to discover the intention of the parties and fix the meaning of the words. (*Walker v. Tucker*, 70 Ill. 527.) But this does not mean that we shall look at the language of the recitals, alone. It simply means that we shall look at the entire language,—that included in the recitals as well as that included in the operative part of the instrument,—and from the whole ascertain the intention of the parties." Many other authorities to the same effect might be cited, but it is unnecessary to do so, counsel for appellant, as we understand, conceding the rule, basing their contention here upon the assumption that the third clause is of uncertain or doubtful import,—an assumption, as we have seen, not warranted. We do not deem it important to pursue at length the argument of counsel on either side upon this branch of the case. In our opinion the construction here announced clearly appears from a consideration of the whole contract, and can be escaped only by a strained interpretation of the language used.

*Stewart v. Stewart*, 7 Johns. 228, which counsel for appellant rely upon as controlling this case, is not in point. The construction placed upon the contract there before the court was, that it did no more than to give the wife the power of appointment over her property during her lifetime, there being no provision relinquishing the husband's right to the same after her death. In other words, the effect of that contract was held to be that which is insisted upon as the proper construction of this contract, and, of course, under that construction it was properly held that at the wife's death the covenant had fulfilled its object and its provisions were exhausted.

The contract having been executed and delivered, so as to become operative between the parties, and its

proper construction being that it relinquished on the part of the husband all his rights, as such, in the estate of his wife, it only remains to be considered whether appellee had the right, in a court of equity, to the relief prayed. On this branch of the case it is contended on behalf of appellant, that, the only consideration for the agreement being the contemplated marriage, he is a mere volunteer, and not within that consideration. There is a distinction in the law between marriage settlements which have been actually executed and mere marriage articles only for a settlement, and as to the latter it has been said: "The parties seeking a specific execution of such articles may be those who are strictly within the reach and influence of the consideration of the marriage or claiming through them, such as the wife and issue, and claiming under them; or they may be mere volunteers, for whom the settlor is under no natural or moral obligation to provide, and yet who are included within the scope of the provisions in the marriage articles, such as his distant heirs or relatives, or mere strangers." (Story's Eq. Jur.—11th ed.—sec. 986.) And the author proceeds: "Now the distinction is, that marriage articles will be specifically excepted upon the application of any person within the scope of the consideration of the marriage or claiming under such person, but not generally upon the application of mere volunteers."

On the assumption that this contract amounts merely to articles of marriage, and under the rule announced, it is insisted that complainant below cannot ask a court of equity to decree a specific performance of the same. Practically the contract is a marriage settlement actually executed between the parties, the language upon which this bill is based being the agreement on the part of the husband to execute, upon request, any deed which may by counsel be deemed necessary "*more effectually to bar or extinguish* any right of dower or of homestead or inheritance in the estate of the said Eureka C. Story."

Even without this provision, under our construction of the contract the defendant, Dunlop, is entitled to receive no part of his wife's estate. The relief here sought is only to more effectually carry out the executed marriage contract. Moreover, the rule as stated by Judge Story, that marriage articles will not generally be specifically executed upon the application of a mere volunteer, does not apply to the facts of this case. In Schouler on Domestic Relations (2d ed. 264) the author says: "In *Nevis v. Scott*, which came up on appeal before the Supreme Court of the United States, the rights of collaterals under a marriage agreement received consideration, and it is declared as the result of the authorities, English and American, that if, from the circumstances under which the marriage articles were entered into by the parties or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives in a given event should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. They will not be regarded as volunteers outside of the deed, but as coming fairly within the influence of the consideration on which it is founded, the consideration extending, in fact, through all the limitations for the benefit of the remotest persons provided for, consistent with law." The *Nevis case* fully sustains what is here said as to the scope of its decision.

In view of the facts before stated concerning the parties at the time of the execution of their marriage contract, manifestly neither of them contemplated the birth of issue as a result of the marriage. They covenant in the third clause, he for himself and his heirs with her and her heirs,—clearly indicating that they then understood that at the death of the wife her heirs would not be his; and as we have said, he having relinquished all his right and claim to her estate, they must have contemplated her collateral heirs. Therefore, the appellee



comes fairly within the influence of the consideration on which the contract is founded.

We find no reversible error in this record, and the decree of the circuit court will be affirmed.

*Decree affirmed.*

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JOHN B. BLANK, Jr.

v.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

*Opinion filed October 19, 1899—Rehearing denied December 9, 1899.*

1. EVIDENCE—*when contract set up in special pleas is admissible though demurrer to pleas was sustained.* A contract set up as a defense in a special plea, to which a demurrer has been sustained, is not for that reason inadmissible in evidence under the general issue, if relevant and otherwise unobjectionable.

2. CARRIERS—*railroad company may exempt itself from liability for injury to express messenger.* A contract between a railroad company and an express company, which provides that the former shall not be liable for negligence respecting injury to the express company's employees as a condition to granting the right to carry express on trains, is not against public policy. (MAGRUDER, J., dissenting.)

3. SAME—*an express messenger riding in express car, attending to express business, is not a passenger.* An express messenger carried in a special car and under a special contract to attend to his employer's express business is not a passenger.\* (MAGRUDER, J., dissenting.)

*Blank v. Illinois Central Railroad Co.* 80 Ill. App. 475, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

STRONG, MILSTED & EHLE, and W. F. STRUCKMANN, for appellant:

A master cannot, by a contract with a servant, in consideration of the employment, exempt himself from lia-

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\*The rights of express messengers carried by railroads under contracts restricting liability are considered in a note to *Muldoon v. Seattle City Railroad Co.* (Wash.) 22 L. R. A. 794.

bility to the servant for injuries sustained through the negligence of the master and for which he would otherwise be liable, such a contract being void as against public policy. 14 Am. & Eng. Ency. of Law, 910; *Railroad Co. v. Orr*, 91 Ala. 548; *Roesner v. Herman*, 8 Fed. Rep. 782; *R. & D. Co. v. Jones*, 92 Ala. 218; *Johnson v. Railroad Co.* 86 Va. 975.

The question whether there was negligence on the part of appellee is one of fact for the jury. *Railroad Co. v. Ashline*, 171 Ill. 320; *Railway Co. v. Brown*, 152 id. 484.

The degree of negligence is a question of fact for the jury. *Railway Co. v. Brown*, 152 Ill. 484; *Railroad Co. v. Murovski*, 179 id. 77.

An express messenger, when carried under a contract with a railroad company, made by the express company, for the transportation of express matter in his charge, is a passenger for hire. *Voight v. Railway Co.* 79 Fed. Rep. 561; *Fordyce v. Jackson*, 56 Ark. 594; *Blair v. Railroad Co.* 66 N. Y. 313; *Railway Co. v. Ketcham*, 133 Ind. 346; *Jones v. Railway Co.* 125 Mo. 666; *Yeomans v. Navigation Co.* 44 Cal. 71; *Railway Co. v. Wilson*, 79 Tex. 371.

A contract void as against public policy cannot be held good for any purpose. *Lumber Co. v. Hayes*, 76 Cal. 387; *Runt v. Herring*, 21 N. Y. Supp. 245; Bishop on Contracts, secs. 188, 611; Clark on Contracts, 471; Anson on Contracts, 252; *McNamara v. Gargett*, 68 Mich. 454.

A railroad company cannot exempt itself from liability for negligence to a passenger. *Arnold v. Railroad Co.* 83 Ill. 273; *Hart v. Railroad Co.* 112 U. S. 338; *Railroad Co. v. Derby*, 14 How. 483; *Railroad Co. v. Beebe*, 174 Ill. 24; *New World v. King*, 16 How. 469; *Railway Co. v. Lockwood*, 17 Wall. 359.

EDWIN WALKER, for appellee:

The right of a railroad company to insist upon an accident release from an express messenger riding in a baggage car, although riding upon a passenger season

ticket, is upheld by the Supreme Court of Massachusetts in *Bates v. Railway Co.* 17 N. E. Rep. 633, and *Hosmer v. Railway Co.* 31 id. 652.

Railroad companies are not required, by usage or common law, to transport the traffic of independent express companies over their lines in a manner in which the traffic is usually carried and handled; and they need not, in the absence of a statute requiring it, furnish to such express companies equal facilities for doing an express business upon passenger trains. *Railroad Co. v. Keefer*, 44 N. E. Rep. 798; *Express cases*, 117 U. S. 1; 6 Sup. Ct. 542; *Sargent v. Railroad Corp.* 115 Mass. 416.

Railroad companies are common carriers, and as such have a right to restrict liability by such contracts as may be specially agreed upon, they still remaining liable for gross negligence or willful misfeasance. *Railroad Co. v. Morrison*, 19 Ill. 135; *Western Trans. Co. v. Newhall*, 24 id. 466; *Railroad Co. v. Reed*, 37 id. 485; *Railroad Co. v. Smyser*, 38 id. 355; *Express Co. v. Haynes*, 42 id. 89; *Railroad Co. v. Frankenberg*, 54 id. 88; *Railway Co. v. Montfort*, 60 id. 175; *Express Co. v. Stettaners*, 61 id. 134; *Field v. Railroad Co.* 71 id. 458; *Arnold v. Railway Co.* 83 id. 273; *Hawk v. Railway Co.* 147 id. 399; *Railroad Co. v. Simon*, 160 id. 648; *Railway Co. v. Chapman*, 133 id. 96.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant was an express messenger in the employ of the American Express Company, and on January 15, 1896, was engaged in the performance of his duties for that company in the forward half of a baggage and express car, being the portion of such car furnished by appellee to the express company for doing its business on appellee's line. When the passenger train of which this car was a part was nearing Rockford from the east, a freight train drew in on a side-track to let it pass. The freight train had to stop twice to turn switches, and

when it finally got in on the side-track a coupling link had broken, so that the engine lost control of the rear part of the train and the caboose stood too near the main track. If the link had not broken it would have been on the side-track out of the way seven minutes before the arrival of the passenger train. The baggage and express car struck the caboose and appellant was injured. He sued appellee for damages, alleging in both counts of his declaration that he was upon the car in the discharge of his duties as messenger for the express company, and charging, in the first count, negligence in allowing the freight train to stand on the side-track in such a manner as to collide with it, and in the second, negligence in running the express car against the side-tracked train. There was a trial, at which it was proved without dispute that the breaking of the link, which left a part of the freight train too near the main track, was due to a latent defect which could not be detected. The only question on the subject of negligence was whether or not there was time enough, with proper exertions, to couple up again and get out of the way. There was no evidence of anything like gross negligence or willful conduct.

The defendant proved and offered in evidence a contract made by the plaintiff with the express company to secure employment, by which he assumed all risks of accidents and injuries in the course of his employment occasioned by the negligence of any corporation operating any railroad and releasing such railroad company from any liability to him; also a contract, referred to in plaintiff's said contract, made by the American Express Company with the defendant in order to have its merchandise and property and employees carried by defendant and its business carried on upon defendant's line, by which the express company agreed to indemnify and save harmless the defendant against all liability for loss or damage resulting in any manner to the express matter, or the employees, agents, messengers or officers of the express

company. After all the evidence was in, the court instructed the jury to find the defendant not guilty, which was done, and judgment entered accordingly. An appeal was taken to the Appellate Court, where the judgment was affirmed, and a certificate of importance being granted, the case was brought here.

The admission in evidence of the accident release, and the contract between the defendant and the express company, to which it referred, is assigned as error. The ground of the objection to them is, that the contract had been set up as a defense in special pleas, to which demurrers had been sustained. The sustaining of such demurrers would not affect the admissibility of the contract under the general issue if it were otherwise admissible, and it was relevant and admissible under such general issue. Plaintiff alleged and testified that he was in the employ of the express company as express messenger, and on his cross-examination it appeared that he had signed this contract fixing terms and conditions of his employment. It was proper to show such terms, and the claim that the contracts were not admissible under the issue cannot be sustained.

The main question in the case concerns the validity and legal effect of plaintiff's contract. The ground of attack upon the contract is that it is void, as against public policy. It is first argued that it is a contract of employment between the plaintiff and the express company, which is contrary to public policy, as exempting the employer from the consequences of its negligence. It is insisted that an employer cannot stipulate for immunity against his own negligence, and that a contract intended to have that effect is void, as tending to relax the employer's care and to increase the perils of the occupation. The question thus sought to be raised has no relation to this case, since the contract is not sought to be enforced for the purpose of relieving plaintiff's employer, the express company, from the consequences of

its negligence or affording it immunity for its wrongful act. It is not alleged or claimed by any one that the employer was in fault or neglected any duty toward the plaintiff. The question is whether the defendant had a right, in taking the express company and its business and employees upon its road, to make the contract that it should not be liable for the negligence of its employees.

It is insisted that plaintiff occupied the position of a passenger for hire, and that public policy will not permit a contract to be made releasing a carrier from liability to a passenger for its negligence. If the defendant was a common carrier of the American Express Company and its goods and messengers doing business on the line and in the express car in question, the authorities cited in support of that position would be applicable; but it seems to be settled that a railroad company is not a common carrier of other common carriers and their business. Each of the parties is a common carrier for the public, and the railroad company is not bound to furnish facilities to every express company that applies for carrying on its business on its road. It is not charged with the duty of carrying express companies at all, and is therefore entitled to make a special contract establishing the duty and liability of the railroad on its side and of the express company on the other. The Supreme Court of the United States so held in the express cases, (117 U. S. 1,) and pointed out the reasons why special contracts in reference to such business are necessary. A railroad company takes an express company on its road by virtue of a special contract, in which the rights and duties of the parties are defined in such manner as, in the opinion of the parties, will be most suitable or beneficial to them. Such a contract gives to the express company rights superior to other express companies and to the general public, which it has no right to demand, and which the railroad company is under no obligation to furnish except upon terms agreeable to it. In this instance such a con-

tract was made, by virtue of which the express company's goods, and the plaintiff, as its employee, were upon the car, carrying on the business of the express company as a common carrier. Plaintiff was being carried for the sole purpose of handling and caring for the express company's goods, which were, being carried under the terms of the special contract and which the defendant was not otherwise bound to carry at all. The question whether, under such circumstances, a contract relieving the carrier from liability for negligence merely is valid has several times been considered. The principle was sustained in *Bates v. Old Colony Railroad Co.* 147 Mass. 255, and *Hosmer v. Old Colony Railroad Co.* 156 id. 506; and in two cases in Indiana contracts in all respects like those made in this case have been sustained by the Supreme Court. (*L., N. A. & C. R. R. Co. v. Keefer*, 146 Ind. 21; *P., C., C. & St. L. R. R. Co. v. Mahoney*, 148 id. 196.) The contract gave the express company, and plaintiff, as its messenger, rights which defendant, as a common carrier, could not have been compelled to grant, and in such a case a carrier may contract as a private carrier, and require exemption against liability for negligence as a condition of granting such rights. An agreement to take and carry property in such a case, under such conditions as the parties agree upon, is held not to be against public policy.

As against these decisions we are not referred to any decision of a court of last resort, and the only opinion to the contrary cited by counsel is one by Judge Taft, passing upon a demurrer to an answer in a trial court. In that opinion the judge expressly disapproves of the decisions of the Supreme Court of Indiana, and reaches the opposite conclusion by the following course of reasoning: In the absence of a contract exempting a railroad company from liability, the relation between a railroad company and an express messenger is that of public carrier to a passenger for hire; a railroad company is under no obligation to carry an express messenger, as such, but he

is not a different kind of freight from any ordinary passenger, except that he travels in a special car; he would have the right to demand of a railroad company that he should be carried in a passenger car if he tendered his fare; therefore, when it carries him as an express messenger in the car provided for the express matter and messenger it is discharging its function as a common carrier of persons, and he does not lose his right and character as a passenger. In other words, the opinion concedes that a railroad company is not a common carrier of other common carriers and their messengers, but holds that if it makes a special contract to carry them it does so as a common carrier and in the performance of its function and duty as a common carrier. The holding there is, that one who contracts with a carrier specially for unusual privileges, which he could not demand and the carrier is not bound to grant but which are conceded upon special conditions, is not bound by his contract. It is true that a messenger would be entitled to be carried in a passenger car if he tendered his fare, but a railroad company is not bound to carry an express messenger with his goods, for the purpose of carrying on business on its road, in a passenger car or any kind of a car. The messenger is not carried in the capacity of a passenger, but in a special car to do his employer's express business, and the common acceptance of the word "passenger" would not embrace such a person so engaged. We do not see how it could follow that because a person who is an express messenger might be a passenger in a passenger car he is also a passenger while doing his employer's business in the express car. The reasoning of the other courts seems to us the sounder and better.

An attempt is made to liken this case to the case where a person is carried with his stock or goods and where he is regarded as a passenger. There are many such cases where the carrier is bound to receive and carry goods or stock, and where, by general usage or by the



rules of the company, the owner or his agent may go or is required to go in charge of the property. In such case the owner is entitled to demand the carriage of his property as a part of the duty of the railroad company toward the public as a common carrier, under the conditions fixed by the law. The railroad company is bound to receive and carry for anybody who shall appear, and by the rules or usage of the company the charge for carrying the stock includes the carrying of the person in charge. Such a person is a passenger. But the difference in the relation between such a case and this is apparent.

The plaintiff acknowledged the execution of the contract which was a bar to his cause of action, and the direction of the court to find for the defendant was justified thereby.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER, dissenting:

I concur in the views expressed by Judge Taft referred to in the opinion and found in *Voight v. Baltimore and Ohio Southwestern Railway Co.* 79 Fed. Rep. 561. In that case it is held, and to my mind conclusively demonstrated, that, "while a railroad company is under no obligation to carry an express messenger as such, yet, when under a contract with the express company it does carry him, it is discharging its function as a common carrier of persons, and he does not lose his rights and character as a passenger because he travels in a special car provided by the railroad company;" and that "a contract, whereby a passenger on a railroad train agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants, is void as against public policy, and this rule applies to an express messenger carried by a railroad company in a special car under a contract with the express company."

JOHN SASSENBERG *et al.*

v.

JOHN H. HUSEMAN *et al.*

182	841
108a	855
182	841
202	876

*Opinion filed October 16, 1899—Rehearing denied December 8, 1899.*

1. **EVIDENCE**—*what evidence will not overcome notary's certificate.* A notary's certificate that a married woman, upon examination separate and apart from her husband, acknowledged the execution of a deed, is not overcome by the husband's testimony, based only on recollection, that his wife was not present when he signed the deed, or by the evidence of two interested witnesses that the signature does not resemble the wife's handwriting.

2. **DEEDS**—*grantor's failure to assert ownership for over thirty years tends to support validity of deed.* Failure of one who conveyed premises to assert any claim thereto for over thirty years tends to establish the validity of the deed, and that it was executed with the understanding that all the grantor's interest passed by it.

3. **SAME**—*deed construed as passing land described subject to dower interest of third person.* A deed, the granting clause of which describes one hundred and twenty acres of land but excepts the grantors' interest in forty acres of the land set off, or which might be set off, to a third person as dower, expressing an intent to convey the grantors' interest in the eighty acres and in the widow's dower, passes the one hundred and twenty acres subject to such dower.

4. **SAME**—*habendum clause may be read in connection with granting clause to explain ownership.* While the *habendum* clause cannot be regarded as the deed if clearly repugnant to the grant, yet it may be read in connection therewith, as defining the extent of ownership in the thing granted, where the granting words leave the subject of such ownership open to explanation.

APPEAL from the Circuit Court of Bureau county; the Hon. HARVEY M. TRIMBLE, Judge, presiding.

Appellants filed their bill asking for partition of certain lands in Bureau county, containing one hundred and twenty acres, described as the north half of the north-east quarter of section 1, township 17, north, range 7, east, known as lot 2, upon the east half of which were situated the homestead improvements, and the east half of the south half of said north-east quarter of section 1, known as lot 1, which they claimed their mother owned

as tenant in common with appellees, claiming the appellees owned an undivided two-thirds and their mother to have owned an undivided one-third of the property. Appellees claimed to be the owners of all the property in fee by descent and chain of conveyance as follows, proved at the hearing: Joseph Bulfer, Sr., died August 24, 1861, intestate, the owner of and occupying the premises in controversy, leaving his widow, Theresa Bulfer, and Joseph Bulfer, Jr., a son, and Magdalena Sassenberg (*nee* Bulfer) and Maria Ann Bulfer, daughters, his only heirs-at-law. On October 19, 1863, Maria, one of the daughters, conveyed all her interest in the land to her brother, Joseph Bulfer, by special warranty deed. On the 15th day of October, 1863, Magdalena Sassenberg, the other daughter, together with Peter Sassenberg, her husband, quit-claimed her interest to her brother, Joseph, for \$150. After the death of Joseph Bulfer, Sr., the widow continued to retain the actual occupancy of the land, her son, Joseph, residing with her, until October, 1869, when Joseph Bulfer and his mother conveyed the land by warranty deed to George Fenn, who resided on the land from that time till his death, in 1880, intestate, leaving surviving a widow, Fredericka Fenn, and a number of children, including Anna H., the wife of John H. Huseman, being the appellees herein, who subsequently acquired all the interests of the widow and the other children, and were at the time of the filing of the bill in possession. Appellants are the children of Magdalena Sassenberg, who died in 1894, intestate, Peter Sassenberg, her husband, surviving her. Her estate was never administered.

Appellants, by amendment to their bill, made after partial hearing, say that after the coming in of the answer they have learned that the Husemans claim to be the owners in fee of Magdalena's one-third in the one hundred and twenty acres of land in controversy by quit-claim deed from her and her husband to Joseph Bulfer, and aver that such pretended deed, if any they have, is

false and fraudulent; that the defendants, or some of them, have a writing purporting to convey the interests of one Peter Sassenberg and Helena Sassenberg, his wife, in eighty acres of said land, specially excepting their interest in forty acres of said lands, which said instrument appears of record in book 38, at page 70, of records of the recorder of Bureau county; that when said writing was recorded it purported to be executed by Peter Sassenberg and Helena Sassenberg, his wife; that the name of Magdalena Sassenberg nowhere appeared on said pretended deed of conveyance as a part thereof, and that since the recording thereof the said Husemans, or some one for them, have fraudulently, as against the rights of complainants, altered and changed the signatures, changing the words "Helena Sassenberg" by erasing and removing the same and fraudulently inserting in lieu thereof the words "Magdalena Sassenberg;" aver that the certificate of acknowledgment is false and was the result of fraudulent collusion between the notary and Joseph Bulfer, Jr., the grantee therein named; aver that Magdalena never conveyed her interest in said lands, never signed said pretended deed and never acknowledged the same; that the said instrument as it now appears, with the pretended signature of Magdalena, is a forgery; that the pretended deed was, by reason of the said alteration, wholly invalid and inoperative as a conveyance of title at any time since its alteration aforesaid, and never was a deed of conveyance of title of said Magdalena to said lands or any part thereof, and should be surrendered for cancellation; aver further that Magdalena never received the \$150 named as the pretended consideration; that there was no consideration for the deed, and that George Fenn had notice of such want of consideration.

The amended answer of the Husemans admits they claim title to the one-third interest of Magdalena in all of said lands through said quit-claim deed to Joseph Bul-

fer, Jr., the grantor of George Fenn, and specifically deny each and every other allegation, in detail, in the amendment. They aver the deed to be good and valid, acquired in good faith, and now without alteration; that Magdalena did receive the \$150 purchase price named in the deed made by herself and Peter, her husband, and aver that the defendants are owners in good faith, as purchasers of said lands for value, without notice of any defect in title to said lands in the parties from whom they obtained the same. The court dismissed the bill on hearing, and complainants prosecute this appeal.

FRED T. BEERS, for appellants.

C. H. WOOSTER, IRA C. GIBONS, and GEORGE S. SKINNER, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The deed from Magdalena Sassenberg and husband to Joseph Bulfer, the validity and effect of which constitute the principal controversy in the suit, is as follows:

"This indenture, made this fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-three, between Peter Sassenberg and Hellena, his wife, of the city of Peru, LaSalle county and State of Illinois, parties of the first part, and Joseph Pulver, of the county of Bureau and State of Illinois, party of the second part:

"*Witnesseth:* That the said party of the first part, for and in consideration of the sum of \$150 in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom, have remised, released, sold, conveyed and quit-claimed, and by these presents do remise, release, sell, convey and quit-claim, unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand which the parties of the first part have in and to the following described lot, piece or parcel of land, to-wit: The north half (½) of the north-east quarter (¼) and the south-east quarter (¼) of said north-east quarter (¼) of section one (1), town seventeen (17), north, range seven (7), east of the fourth (4th)

principal meridian, except their interest in forty acres of said land, being the forty acres, one-third part of said land, which may be set off to Theresy Pulver, widow of Joseph Pulver, deceased, or which may belong to her as her dower in said lands. It is intended by this deed to convey only said parties' interest in eighty acres of said land and their interest in the widow's dower. To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatever of said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

"In witness whereof the said party of the first part hereunto set their hands and seals the day first above written.

PETER SASSENBERG, [Seal.]

MAGDALENA SASSENBERG. [Seal.]"

Julius Heinrich, a notary public for LaSalle county, certifies the acknowledgment of the deed by Peter Sassenberg and Magdalena Sassenberg, and the examination of Magdalena separate and apart and out of hearing of her husband, and her acknowledgment to be the free and voluntary execution of the same without compulsion of her husband, and the relinquishment of her dower in the form of acknowledgment then prescribed. The date of the acknowledgment is October 15, 1863, and it is sealed with the notarial seal of the notary. The deed bears the certificate of the recorder, showing that it was filed for record October 19, 1863, at twelve o'clock noon, and was recorded on page 70 of book 38.

The complainants objected to the admission of this deed for various reasons, principal among which were these: that the deed was a forgery, because after its recording it had been altered; because it purports to convey the fee of Peter Sassenberg, his wife joining, whereas it is the fee interest of Magdalena which is in controversy, and the defendants are estopped from showing title in fee to any person other than Magdalena Sassenberg; that it is not the deed pleaded; because the deed purports to convey only eighty acres instead of one hun-

dred and twenty acres; because its execution was not proven as required by law; because, the deed and the record thereof being different, the deed as altered is wholly incompetent and inadmissible as a legal instrument by which to prove title; and because the record of the deed shows the deed was signed by Helena, that being the only genuine signature it ever had, and as such it is irrelevant and incompetent to pass title of Magdalena's interest. The deed was introduced in evidence over the above objections, whereupon complainants introduced the record, with proof of no erasure thereof and being identical with the original deed above set forth, except the second signature is that of "Hellena Sassenberg."

On the hearing Joseph Bulfer testified, for the defendants, that he farmed the one hundred and twenty acres in question for about nine years after his father's death, in 1861, and it was stipulated by the complainants that the parties in possession had paid the taxes on the land ever since the death of Joseph Bulfer, Sr. The above deed being shown, the witness identified it, and stated that the deed was drawn in Peru, Illinois; that he bought the land from Sassenberg, and that both he and his wife, Magdalena, were present when he bought it; that he bought the whole one hundred and twenty acres of land, and that if the scrivener made a mistake of any kind it was not his fault; that both Peter Sassenberg and his wife (witness' sister) were present in the office and acknowledged the deed before the officer; that the officer asked her if she was satisfied, and that she signed the deed, and that after she signed it she acknowledged it. Witness stated further that Mr. Fenn, the person to whom he sold in 1869, had remained in possession of the land ever since, up to the time of his death; that the \$150 called for by the deed to him he sent to her about a year after he got the deed, by a man named Yager, and that Peter Sassenberg told him afterwards that she had received it; that Magdalena never lived on the land after-

wards. He does not remember who the scrivener was, or the name of the notary, or the office where the papers were executed or acknowledged, but says that Peter Sassenberg selected the scrivener,—that he knew nobody in the town.

Peter Sassenberg, called for complainants, remembered the deed when shown him, and that it was made out by George D. Ladd, and swore that his wife was not present when the deed was made; that he had not intended to sell to Joseph anything but the eighty acres; that the signature at the bottom purporting to be that of his wife looks something like her handwriting, but he does not think she signed it; that he never saw her sign the deed; that his wife wrote her name "Mary Magdalena," and was so christened; that she had nothing to do with the sale of the land, and that the consideration was paid to him—not to her.

Anna Wacker, one of the complainants and daughter of Magdalena Sassenberg, testified she was familiar with her mother's handwriting, and that the name "Magdalena Sassenberg," at the bottom of the deed, was not in her handwriting. The son testified that his mother said to him at the time she was to sign a deed shortly before her death, that that was the first deed she had ever signed. This testimony was objected to, on the ground that the witnesses were incompetent to testify. Two witnesses for the complainants testified that they had known Joseph Bulfer, Sr., and his family, and that Magdalena always went by the name of "Lena" and was not called "Magdalena."

The evidence in this case is far from sufficient to overcome the effect of the notary's certificate of acknowledgment of the deed in question by Magdalena Sassenberg. At the time this case was heard that deed was thirty-two years old and had been on record all of that time. Taxes were paid regularly. The possession of the defendants, or those from whom they claimed, was actual, open, no-



torious and continuous, and, from all that appears in the record, exclusive and adverse.

The appellants contend that the possession of the appellees, and those through whom they held, being under the deed in which Theresa Bulfer, widow of the original ancestor, joined, and who was then entitled to dower and homestead, is not inconsistent with the rights of Magdalena as tenant in common, and that the Statute of Limitations would not run against her. It is no doubt the law that as between tenants in common possession of one is possession of all, and that the Statute of Limitations will not begin to run until the actual possession is made, by open, notorious and visible acts, to become adverse to the rights of the co-tenants. But the dower of the widow of Joseph Bulfer, Sr., seems, by common understanding between her and the heirs, to have been regarded as in one forty-acre tract only, and, independently of the deed in question, it is probable that had Magdalena claimed any interest in the one hundred and twenty acres she would have asserted it long before her death, and as soon as her mother abandoned the premises and they passed into the possession of strangers. Her never having asserted any claim in any way by her acts is consistent with the validity of the deed in question, and that it was executed by her with the understanding that all her interest passed by it.

None of the facts and surrounding circumstances of this case tend to impeach the Sassenberg deed, but rather to support it. No fraud, collusion or imposition on the part of the officer taking the acknowledgment is sought to be shown. There was testimony, based only on recollection, of the husband that his wife was not present when the deed was executed by him, and of two other witnesses who are directly interested, who say the writing does not resemble the handwriting of their mother. That she was not present is not inconsistent with the notary's certificate that she was examined separate and

apart from her husband, in the form of acknowledgment then required by law. In *Russell v. Baptist Theological Union*, 73 Ill. 337, this court held that the acknowledgment of a deed cannot be impeached for anything but fraud, and that the mere evidence of the party purporting to make the acknowledgment cannot overcome the officer's certificate, nor that such evidence slightly corroborated will overcome it. In *Kerr v. Russell*, 69 Ill. 666, it was held that the certificate of the acknowledgment of a deed by the wife may be impeached, but that the proof to sustain such charge must be of the clearest, strongest and most convincing character, and be by disinterested witnesses.

The private examination of the wife by the notary, as was required by the law at the time of the making of the deed, was designed as a substitute for and of equal dignity with the proceeding at common law by fine and recovery, and to protect and guard the rights of the wife, and to render sure, indefeasible and unquestionable the title of the grantee. To permit evidence of the character presented by this record to overturn titles to real estate conveyed under the formalities of the law, after the lapse of thirty-three years, would tend greatly to produce insecurity, uncertainty and confusion as to land titles, and to open the door for perjury and fraud. Questions of this kind have been frequently before this court, and while it has never refused or denied the right to impeach the certificate of acknowledgment, it has uniformly held that the proof to authorize the same must be clear, cogent and convincing. *Calumet and Chicago Dock Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, *supra*; *Heacock v. Lubuke*, 107 Ill. 396; *Russell v. Baptist Theological Union*, *supra*.

The appellants contend that the deed conveyed only eighty acres of land, and that the provision after the description of the forty-acre tract, "except their interest in forty acres of said land, being the forty acres, one-third part of said land, which may be set off to Theresy Pulver, widow of Joseph Pulver, deceased, or which may belong

to her as her dower in said lands; it is intended by this deed to convey only said parties' interest in eighty acres of said land and their interest in the widow's dower," excluded from the deed forty acres of the tract absolutely, and that as to forty acres there was an absolute exception from the deed as a conveyance. The granting clause of the deed describes one hundred and twenty acres of land, and had the parties intended to convey only eighty acres there is no reason why only such description of eighty acres of land should not have been written into the deed. The manifest intention of the parties was to recognize the rights of the widow to dower in the one hundred and twenty acres, and not to exclude or conclude her in any way. The very clause of the exception shows that it was the intention of the parties not only to convey the eighty acres of land, but the grantors' interest in the widow's dower, which the deed shows was regarded and treated as belonging to the widow.

While the *habendum* clause cannot be regarded as the deed if clearly repugnant to the grant, yet it may be read in connection therewith, as defining the extent of ownership in the thing granted, where the granting words leave the subject of such ownership open to explanation; and in this case that clause strengthens the construction we have above given. In the case of *Crosby v. Montgomery*, 38 Vt. 238, the administrator sold the estate of his intestate after his wife had her dower set off, and described the premises by metes and bounds, excepting the widow's third of so many acres set off on the west side of the tract, and it was held to be an exception of her life estate in that part of the tract, and not so much of the tract itself in fee.

We have not deemed it necessary to pass upon the competency of the witnesses as raised by the objections in this case, as it is clear that the decree of the circuit court of Bureau county was correct, and the decree is affirmed.

*Decree affirmed.*

*In re* ESTATE OF HENRY SEITER, Insolvent,

v.

RICHARD MOWE *et al.**Opinion filed October 16, 1899—Rehearing denied December 13, 1899.*

1. PRACTICE—*motion undisposed of at term is continued by operation of law.* A motion to set aside an order may be entered during the term at which such order was made, and, if undisposed of, it stands continued until the next term by operation of law, without any formal order of continuance.

2. VOLUNTARY ASSIGNMENTS—*when general creditors are not estopped to object to allowance of claim as a preference.* The failure of general creditors to file objections to the report of an assignee within thirty days, concerning which no order of approval was entered, does not estop them from subsequently making the objections, when the judicial power of the court is invoked for the allowance of a reported claim as a preference, which the assignee had paid without his report being approved.

3. SAME—*when beneficiary cannot enforce claim for trust fund as a preference.* The owner of a trust fund, which the trustee has mingled with his own money, is not entitled, upon the trustee's insolvency, to enforce his demand as a preferred claim against the trustee's estate assigned for the benefit of creditors, unless the fund can be identified or distinguished from other assets of the estate.

4. SAME—*trust fund mingled with insolvent's property passes to the assignee.* A trust fund so blended with the mass of the trustee's property that it cannot be distinguished passes to his assignee for the benefit of all creditors.

PHILLIPS, J., dissenting.

*Estate of Henry Seiter v. Mowe*, 81 Ill. App. 346, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the County Court of St. Clair county; the Hon. E. C. RHODES, Judge, presiding.

DILL & WILDERMAN, and TURNER & HOLDER, for appellant.

HORNER & WINKELMANN, for appellees.

182	351
99a	4555
182	351
197	4110
d197	4115

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellant, Weir, was named as the assignee in a voluntary assignment for the benefit of creditors by Henry Seiter, of St. Clair county, December 10, 1894. As such assignee, notes, accounts, cash and chattel property amounting to about \$45,000 came into his hands. In 1888 Seiter had been appointed conservator of one Lucetta Nichols, an insane person, and had received of her money \$2206. For the purpose of this opinion it may be conceded that trust fund was mingled with his individual moneys in his private bank at Lebanon, this State, and that in February, 1895, being after the assignment, he made a final report showing the amount due from him as such conservator to be \$1977.66, with which report he tendered his resignation, and one Isaac Barton was appointed his successor. No funds whatever were paid over to Barton, and on the fifth of March following he filed a claim against the assigned estate of Seiter, as follows: "To amount of money in the hands of said Henry Seiter, as conservator of Lucetta Nichols, an insane person, and mingled with his funds and property at the time of his assignment, \$1977.06." It was duly sworn to, and urged as a preferred claim. On April 5, thereafter, the assignee reported to the county court this with other claims filed to that time. No objections had been made by any one to said claim. On June 10 of the same year L. D. Turner was appointed successor of Barton, as such conservator. On the 4th of September, 1897, Weir, the assignee, filed another report in the county court, of moneys collected and disbursements made, showing the payment of the Nichols claim, which then amounted to \$2224.18, and asked the court to approve that report and enter an order to pay dividends. Thereupon an order was entered that all objections to the report be filed by the 14th of that month. Appellees, being general creditors of Seiter, on the 11th of that month, within the time limited, did file objections to the allowance of the aforesaid claim as

a preference and to allowing the assignee credit for its payment, alleging that the distribution of the assigned property should be made *pro rata* to all the creditors of the estate. These objections were set down for hearing on the 23d of the month, and on that day overruled by the court and the assignee's report approved. On the 29th of October, following, appellees entered their motion to set aside that order, and on the 22d of the next month their motion was allowed and the order of September 23 vacated and set aside. Afterwards a hearing was had upon the report and objections of appellees, and the matter held under advisement until February 17, 1898, when a decision was rendered by the court sustaining the objections of appellees, and refusing to approve the report of the assignee as to the payment of the Nichols claim, and refusing to allow the assignee credit for its payment, and ordering him to recover the money back from Turner. From that decision the assignee appealed to the Appellate Court for the Fourth District, where the judgment of the county court was affirmed, and hence this appeal.

It is insisted that the judgment below should be reversed, upon the ground that at the time it was entered the court had ceased to have jurisdiction of the subject matter of the judgment. This position is predicated upon the theory that when it overruled appellees' objections on the 23d of September, 1897, and approved the assignee's report, it had no further jurisdiction over the matter. This position we regard as untenable. The law terms of the county court of St. Clair county are fixed by statute for the months of March, July and November. The order of approval (September 23, 1897,) must have been as of the July term of that year. The motion to set aside that order, being made on the 29th day of October following, was also of that term, the November term not beginning until the next month. The court had control of its record and judgments during that term, and, having entered

the motion, then could properly continue it for final determination until the next term, which it evidently did, the decision being rendered November 22. Whether there was any formal order of continuance or not is immaterial. The motion being undisposed of at the end of the July term, would, with the adjournment of that term, be continued by operation of law.

It seems from a recital in the order of November 23, overruling the objections and approving the report, that it was made upon an understanding by the court that objector's counsel consented thereto, and it seems to be thought by counsel for appellees that that fact is important in determining the question of jurisdiction to set aside the order. We do not so regard it. That fact may have furnished a reason for the exercise of the jurisdiction, but the power of the court to set aside the order was complete, without reference to the reason which may have called it into exercise.

It is also urged, that inasmuch as no objections were made to the assignee's report of April 5, 1895, in which he reported the Nichols claim, appellees could not object to it on the second report. Section 4 of the Voluntary Assignment act provides that the assignee shall, at the expiration of three months from the time of first publishing notice for the presentation of claims, report and file with the clerk of the county court a list, under oath, of all creditors of the assignor as shall have claimed to be such, with a true statement of their respective claims. The next section authorizes any person interested, as creditor or otherwise, within thirty days after making such report, to file exceptions to any claim of any creditor exhibited in the report, and section 6 is to the effect that at the first term after the expiration of three months, should no exceptions be made to the claim of any creditor or if exceptions have been filed and have been adjudicated and settled by the court, "the said court shall order the assignee or assignees to make, from time to

time, fair and equal dividends (among the creditors) of the assets in his or their hands, in proportion to their claims," etc. So far as shown by the abstract of the record in this case, no action was taken by the court upon the report of April 5. No order of approval was entered, notwithstanding no exceptions were filed to any of the claims stated in the report, nor was any order of distribution made by the court upon that report. The assignee took the responsibility of paying the Nichols claim as preferred, without the approval of his report and without direction from the court to pay it. More than two years thereafter he came into court asking an order of distribution and of approval of such payment. We think, with the Appellate Court, that the mere fact that exceptions were not filed to the claim upon the report of April 5, 1895, did not estop appellees from making the objections in September, 1897, when the judicial power of the court was invoked to allow the claim as a preference. At the latter date the estate was unsettled and undistributed by any order of the court, and having jurisdiction of the persons interested it could change or set aside any order previously made. *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584.

The principal question in the case is whether or not the fact that Seiter, as trustee of the Nichols fund, had mingled it with his other moneys, entitled the conservator of the *cestui que trust* to enforce it as a preferred claim against the assigned estate. It is admitted by counsel for appellant in their able argument that the fund is incapable of identification or distinguishable from the other assets of the estate, and as said by the Appellate Court, "so far as can be seen from the evidence it has been for years mingled and indiscriminately used with the moneys of the Seiter bank." We said in *Wetherell v. O'Brien*, 140 Ill. 146 (on p. 151): "Where a trustee has converted a trust fund into money and mingled it with his other moneys, so that it cannot be separated from the



latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the fund into the hands of an assignee for the benefit of creditors. (*Illinois Trust and Savings Bank of Chicago v. Smith*, 21 Blatchf. 275, and cases there cited.) Its identification is a pre-requisite to the exercise of the right to follow it. (2 Story's Eq. Jur. sec. 1259.) While it may not be necessary to point to the particular pieces of money or the particular bank bills that were deposited with the trustee, if the trust property be money, yet there must be a preservation of the distinctness of the trust fund. The means of ascertaining the identity of the fund fails where the money has been mixed and confounded in a general mass of property in the bank of the same description,"—citing authorities. This language was quoted with approval in *Mutual Accident Ass. v. Jacobs*, 141 Ill. 261. It was also said in *Bayor v. American Trust and Savings Bank*, 157 Ill. 62 (on p. 68): "It has frequently been announced as the law of this State, that even in a case where a definite and actual trust fund, which possesses all the attributes of a separate and distinct identity, has been so mixed and mingled with other funds as to render identification impossible, the *cestui que trust*, in the event of the insolvency of the trustee, is remitted to the position and the rights of a general creditor." See, also, *Trustees of Schools v. Kirwin*, 25 Ill. 73; *Otis v. Gross*, 96 id. 612; *Union Nat. Bank of Chicago v. Goetz*, 138 id. 127.

In *Lanterman v. Travous*, 174 Ill. 459, appellants claimed that the proceeds of a certain check became a trust fund in the hands of the insolvent bank and had been mingled with its other money, and that therefore, in equity, an amount equal to the proceeds of the check should be taken from the money of the bank and paid to her. We there said: "It is unnecessary here to consider whether such a doctrine is or is not consistent with the rule established in this State, as announced in many cases,"—citing cases to the effect that when trust money is mixed with

other funds of the trustee its identity as a fund is thereby lost and that the right to pursue it fails, and the foregoing language in *Bayor v. American Trust and Savings Bank*, *supra*, was quoted as applicable to the case under consideration.

It is earnestly insisted that what was said in the cases above referred to as announcing the law between general creditors and the assignee in a voluntary assignment proceeding was unnecessary to the decision of those cases, and therefore mere *obiter*. This contention, we think, is unsupported by the facts. It is true that some of the cases could have been decided without reference to that question, but that it fairly arose in each of them for decision is manifest from a consideration of the several contentions made by the parties. Nor do we understand that decisions of this court cited by counsel as announcing a contrary doctrine are in point. They go no further than to hold that as between the trustee and *cestui que trust* the former cannot defend against the claim of the latter to the trust fund because he has wrongfully mingled it with his personal moneys, but that the owner of the trust fund may, in such case, enforce a lien for the same against the entire mass, placing the burthen upon the trustee to distinguish between the different funds. When, however, the trustee is insolvent and his estate has been transferred to an assignee, all of his creditors become interested parties, and, on the authority of the foregoing decisions, where the identity of the trust fund is lost, all creditors, including the owner of the trust fund, must share alike. There is a conflict in the authorities as to whether the assignee in such a proceeding is the representative of the creditors or the mere agent of the assignor; but we think there can be no question but that the creditors of the insolvent, upon filing their claims, become interested in the assigned assets; and this is manifest from the provisions of our statute securing to them the right to object to the claims of each other.

It is also insisted that under the repeated decisions of this court the assignee gets only such title to the property of the insolvent as he had prior to the assignment, and therefore a trust fund does not pass to him. But the very question here is whether or not the trust fund here claimed can be distinguished so that it can be specifically appropriated to the object of the trust, or whether it has been so blended in the mass of the insolvent's property that it cannot be ascertained. It was said in *Kip v. Bank of New York*, 10 Johns. 61, (a bankruptcy proceeding): "It is a rule well settled by the authorities cited by the counsel for the plaintiffs, that no estate vests in the assignees of a bankrupt but that of which the bankrupt had the legal and equitable title. Property that he held in trust never passes by the commission, and if that property consists of goods remaining *in specie*, or of notes and other choses in action, the *cestui que trust* is entitled to the property, and not the creditors at large. *The only check to the operation of the rule is when the property is converted into cash by the bankrupt, and has been absorbed in the general mass of the estate so that it cannot be followed or distinguished.* It is the difficulty of tracing the trust money which has no ear-mark that prevents the application of the rule."

Counsel for appellant lay much stress upon what they conceive to be the injustice of permitting a trustee to enlarge his own estate by an appropriation of funds belonging to his *cestuis que trust*, and depriving the latter of the right to pursue the trust fund into a general mass with which it has been confounded, to the extent of enforcing a lien upon the whole mass for the satisfaction of his claim. It must not, however, be forgotten that in cases like this the rights of third parties are involved, and it is upon the ground that they, and not the trustee himself, are entitled to protection that the law as above stated has been announced by this court. As to the decisions of other courts, the most favorable view to ap-

pellant's contention is that they are in conflict. It is enough to say here that in view of our own decisions heretofore rendered, clearly announcing the doctrine adopted by the county and Appellate Courts, we are not now inclined to adopt a different rule.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

MR. JUSTICE PHILLIPS, dissenting.

## THE CHICAGO CITY RAILWAY COMPANY

v.

THOMAS LEACH.

*Opinion filed October 25, 1899—Rehearing denied December 8, 1899.*

1. LIMITATIONS—*additional count re-stating the original cause is not barred.* An additional count filed in an action for personal injuries is not barred by the Statute of Limitations when it is but a re-statement, in somewhat different form, of the cause of action set up in a count of the original declaration filed in time.

2. SAME—*when additional count states a new cause of action.* In an action for personal injuries, where the ground of recovery relied on is negligence of the defendant's servants in operating its cars at such a rate of speed that the train could not be stopped in time to avoid the accident, an additional count, based on the alleged incompetency of the defendant's servants, introduces a different cause of action, which is barred if the Statute of Limitations has run before it is filed.

3. APPEALS AND ERRORS—*when error in sustaining demurrer to plea of Statute of Limitations is ground for reversal.* An erroneous ruling of the court sustaining a demurrer to a plea of the Statute of Limitations interposed to an additional count is ground for reversal when the issue raised by the count was a controverted question and the verdict may have been based entirely upon it.

*Chicago City Railway Co. v. Leach*, 80 Ill. App. 354, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This is an appeal from a judgment of the Appellate Court affirming a judgment of the superior court of Cook county, in which appellee recovered \$16,500 damages for a personal injury received while in appellant's service.

It appears from the statement of facts in the opinion of the Appellate Court, which seems to be sustained by the evidence, that the appellee was a conductor in the employment of appellant, having in charge two cars,—a grip-car and trailer,—operated over the Wabash avenue and Cottage Grove avenue line of appellant's road. The train had come north, and, going around the loop from Madison street along Michigan avenue to Randolph street, had about reached the intersection of the latter street and Wabash avenue, there to begin its return trip southwardly. At that point the train was stopped, and appellee went underneath, between the grip-car and the trailer, to tighten a draw-bar that needed it. While so situated and engaged, and within a minute and a half to three minutes after he had gone in between the cars, another train running upon the same track and operated by a gripman named James Golden, ran into the hind end of appellee's train with such force as to spring its brake, that had been set, and drive it around the curve to and upon Wabash avenue,—a distance of about seventy feet,—before it could be stopped. Appellee was caught underneath the train and dragged the whole distance, receiving very serious as well as permanent injuries. When Golden's train first turned the corner of Michigan avenue and Randolph street he came within plain sight of appellee's train standing still about three hundred feet ahead of him, and there was the evidence of apparently impartial witnesses that he made no effort to stop or slacken the speed of his train until close upon appellee's train, and that instead of looking ahead, as he should have done, he was looking in another direction until too late.

The declaration upon which a trial was had and the cause submitted to the jury consisted of three counts,—

the first original count and the first and second additional counts. It was alleged in the first count of the declaration that on September 27, 1893, defendant was possessed of, using and operating a certain railway extending along and upon divers streets and avenues in Chicago, and was also possessed of, using and operating a certain train of cars which it ran and operated upon said railway, and that plaintiff, on the day aforesaid, was engaged in the service of defendant as a conductor of said train of cars, and as such conductor had charge of said train; that while plaintiff was so in charge of said train, the draw-bars and chains connecting and holding together the grip-car and the next car of said train became and were disarranged and out of order, so that it became and was then and there necessary that said draw-bars and chains be at once re-arranged and put in order, and that it then became and was the duty of plaintiff to then re-arrange said draw-bars and chains and put them in order, and that plaintiff, having charge of said train as aforesaid, caused said train to come to a full stop and to stand still on said track, and, while said train was so standing still, plaintiff, who was exercising due care and caution, then and there stepped between the grip-car and the next car of said train to arrange and put in order said draw-bars and chains, and that while plaintiff was between said cars, engaged in arranging and putting in order said draw-bars and chains, and exercising due care and caution, defendant, by its certain other servants, negligently, carelessly and recklessly drove and operated a certain other train of cars, operated by defendant upon said railway, at so high and dangerous a rate of speed that it could not be stopped, and it with great force and violence ran into and against the train of which plaintiff had charge, and forced the cars of said last mentioned train upon plaintiff so forcibly and violently that plaintiff was then and there and thereby violently thrown to and upon

the ground, and the cars of the last mentioned train ran upon and over him, whereby he was injured, etc.

The first and second additional counts were filed about three and a half years after the accident happened. The first additional count set up, specifically, that appellee and Golden, who had charge of the car producing the injury, were not fellow-servants. In other respects it was substantially like the first count of the original declaration. The second additional count, after alleging appellant's possession and operation of the railway, alleged that appellant had divers servants to operate its trains of cars; that appellee was employed by appellant as a conductor on one of said trains, and then alleged as follows: "That frequently, in the operation of said trains of street cars, said trains were run close to each other, and that by reason of the premises it then and there became and was the duty of defendant to use all reasonable care towards furnishing and retaining competent and careful servants to run, manage and operate its said trains of street cars so as to keep said trains from colliding with each other, but that defendant, at the time and place aforesaid, not regarding its said duty, wrongfully, negligently and improperly provided and retained in its service a certain servant to run, manage and operate one of its said trains of street cars who was incompetent and unfit for the purpose aforesaid, in this, that said servant was habitually reckless and careless in the management and operation of defendant's train which he was employed to manage and operate; that defendant knew, or by the exercise of proper care in that behalf could have known, of said incompetency of said servant, but that plaintiff did not know of it, and did not have a reasonable opportunity to ascertain the same in time to avoid the injury hereinafter complained of; that at the time and place aforesaid, to-wit, at the intersection of Randolph street and Wabash avenue, on said railway, while the train upon which plaintiff was employed was

standing still, and while plaintiff, in the discharge of this duty, was stooping down between two of the cars of his said train in order to adjust certain chains and appliances on said train which it was necessary to adjust in order to safely operate said train, and while in said position between the said cars, and while, as plaintiff alleges, he was in the exercise of due and ordinary care and caution for his own safety, defendant's said incompetent servant then and there in charge and control of the management and operation of a certain other of defendant's trains of street cars upon said railway, then close to and following the plaintiff's train, by reason and as a result of the reckless, careless and improper manner in which he operated and ran said train, said train thereby then and there ran into and struck against said train of cars between two of which plaintiff was engaged as aforesaid, and plaintiff was thereby then and there knocked down, injured, etc.

To the first and second additional pleas the defendant pleaded the Statute of Limitations. The plaintiff demurred to the pleas and the court sustained the demurrer.

W. J. HYNES, S. S. PAGE, and H. H. MARTIN, for appellant.

WING, CHADBOURNE & LEACH, and JAMES C. MC-SHANE, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The first and second additional counts were filed after the Statute of Limitations had run, and unless those counts may be regarded as a re-statement of the cause of action set out in the first count of the original declaration, the plea of the Statute of Limitations was a bar and the ruling of the court on the demurrer to the pleas was erroneous.



In the first count of the original declaration the relationship of the parties is fully stated, and under the rule laid down in *Chicago and Alton Railroad Co. v. Swan*, 176 Ill. 424, and *Louisville, Evansville and St. Louis Railroad Co. v. Hawthorn*, 147 id. 233, it was not necessary to aver specifically that appellee and Golden were not fellow-servants. It was sufficient that the facts set up established that relation. The first additional count was therefore a mere re-statement, in somewhat different form, of the cause of action set up in the first count of the original declaration, and the demurrer to the plea of the Statute of Limitations to that count was properly sustained.

The ruling of the court, however, on the demurrer to the plea of the Statute of Limitations to the second additional count presents a more serious question. A new or different cause of action introduced by an additional count is treated as a new suit begun at the time of filing such count, and if the Statute of Limitations has run before the new count is filed, the cause of action therein set up will be barred. (*Fish v. Farwell*, 160 Ill. 236.) In *Swift & Co. v. Madden*, 165 Ill. 41, we held that the cause of action may be regarded as the act or thing done or omitted to be done by one which confers the right upon another to sue,—in other words, the act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy. The question here presented, therefore, is whether the act or thing done by the defendant which caused the injury to the plaintiff set out in the second additional count of the declaration is the same as that set out in the first count of the original declaration.

Upon an examination of the first count of the declaration it will be seen that the ground of recovery relied upon was the negligence of appellant's servants in driving and operating a train of cars at such a high and dangerous rate of speed that the train could not be stopped in time to avoid the injury,—in the language of the declara-

tion, that defendant, by its servants, negligently, carelessly and recklessly drove and operated a train of cars operated by defendant at so high and dangerous a rate of speed that it could not be stopped, and it with great force and violence ran into and against the train of which plaintiff had charge. But upon an examination of the second additional count it will be seen that plaintiff does not rely upon the negligence of appellant in operating the train at a high and reckless rate of speed for a recovery, but he proceeds entirely upon a different ground: that it was the duty of appellant to use reasonable care in furnishing and retaining competent servants to run and operate its trains; that appellant did not regard this duty, but wrongfully, negligently and improperly provided and retained in its service a certain servant to run one of its trains who was incompetent and unfit for that purpose; that said servant was reckless and careless; that appellant knew, or by the exercise of proper care could have known, of such incompetency. The act or wrong relied upon in this count is entirely different from the act or wrong relied upon in the first count of the declaration. The evidence to sustain one count would not sustain the other, and the evidence in defense, as against one count, could not be relied upon as a defense under the other. Indeed, the issue presented under one count is not presented under the other. The ground of recovery relied on in one count is different from that set up in the other, and we perceive no ground upon which it can be held that the cause of action involved in the two counts is the same. We regard the question here involved is controlled by *Phelps v. Illinois Central Railroad Co.* 94 Ill. 548, *Chicago, Burlington and Quincy Railroad Co. v. Jones*, 149 id. 361, *Fish v. Farwell*, 160 id. 236, and *Illinois Central Railroad Co. v. Campbell*, 170 id. 163.

It is, however, claimed in the argument that if the court did err in sustaining the demurrer to the plea of the Statute of Limitations, such error should not reverse

the judgment if appellee has made a case under the count alleging that he and Golden were not fellow-servants. We do not concur in that view. In addition to the plea of the Statute of Limitations to the second additional count appellant filed a plea of the general issue, whereby an issue of fact was made to be tried by the jury, and the cause proceeded to trial not only on the count which alleged that appellee and Golden were not fellow-servants, but also on the issue of fact raised in the second additional count, which was predicated on appellant's duty to furnish competent fellow-servants. Much evidence was introduced by the respective parties on this question. Indeed, it was one of the main controverted questions submitted to the jury. For aught that appears the jury may have based their verdict entirely on the issue found in the second additional count of the declaration. Under such circumstances it cannot properly be said that appellant was not prejudiced by the ruling of the court on the plea of the Statute of Limitations interposed to the second additional count of the declaration.

Questions have been raised in the argument in regard to the ruling of the court on the admission of evidence and the ruling on instructions in reference to appellant's furnishing competent servants, but if we are correct in holding that the Statute of Limitations was a bar to that issue it will not be necessary to allude to the ruling of the court on the questions which were raised under it, either as to the admission of evidence or the instructions, as these questions will not arise on another trial.

For the error of the trial court in sustaining a demurrer to the plea of the Statute of Limitations interposed to the second additional count, the judgments of the Appellate and superior courts will be reversed and the cause will be remanded for another trial.

*Reversed and remanded.*

THE METROPOLITAN NATIONAL BANK

v.

THE MERCHANTS' NATIONAL BANK.

182	867
107a	1459

182	867
211	187

*Opinion filed October 25, 1899—Rehearing denied December 9, 1899.*

1. **BANKS**—*certification of raised draft does not preclude right of recovery.* Certification by a bank of a draft drawn upon it, but altered in amount, does not preclude it from showing the fact of such alteration, or prevent a recovery from the party who received the draft on the faith and credit of the certification alone.

2. **SAME**—*legal construction of contract of certification cannot be altered by proof of local usage.* In assumpsit by a bank to recover money paid by it upon a draft which it certified without knowledge that it had been altered in amount, it cannot be shown that the contract of certification, by local usage or by the understanding of bankers and merchants, has a larger scope and meaning than it had by settled legal construction.\*

3. **SAME**—*when bank receiving certified raised draft is liable to drawee for over-payment.* A bank to which a draft, altered in amount and thereafter certified by the drawee bank without knowledge of the fraud, is transferred by an endorsement not restrictive in its nature, and which receives payment of the amount from the drawee, which it credits to the indorser, without paying it over, is liable to the drawee upon discovery of the fraudulent alteration and after demand made for a return of the over-payment.

4. **TENDER**—*draft need not be tendered after refusal of formal demand for amount over-paid.* After formal demand for re-payment made by a drawee who paid the amount of a fraudulently altered draft, and the payee's refusal to do so, no tender of the draft is necessary before bringing suit to recover the amount over-paid.

5. **ACTIONS AND DEFENSES**—*what not a defense to suit by bank to recover over-payment of raised draft.* The right of a bank to recover the over-payment from one to whom it has paid a fraudulently raised draft is not affected by the fact as to whether it credited the drawer on its books with the over-payment before or after suit was begun.

6. **APPEALS AND ERRORS**—*assignment of error on instructions not considered unless alleged error is pointed out.* Error assigned upon instructions given or refused will not be considered on appeal, where the appellant fails to indicate or point out in his brief in what respect there was error.

*Metropolitan Bank v. Merchants' Bank*, 77 Ill. App. 316, affirmed.

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\*The authorities on banking customs are collected in a note to *Shaw & Schoonover v. Jacobs*, (Iowa,) 21 L. R. A. 440.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

We take the following statement of facts from the opinion of the Appellate Court:

"February 7, 1894, the Flour City National Bank of Minneapolis, by its cashier, A. A. Crane, for the sum of \$35.10 to it then paid, drew and delivered its draft for \$35 to Frank H. Harper, payable to his order and directed to appellee. The draft was also perforated '\$35\$.' February 13, 1894, this draft, changed in amount to \$3500 and perforated '\$3500\$,' was presented to appellee for certification and accepted, and the change not being apparent to the paying teller of appellee, he accepted it, and the amount of \$3500 was charged on the books of appellee to the Flour City National Bank. It does not appear by whom this change of the draft was made, but it was changed before its acceptance by appellee and without the knowledge or consent of the Flour City National Bank. February 13 or 14, 1894, the draft, as accepted and certified, was deposited by Harper with the American Trust and Savings Bank of Chicago and credited to his account. February 14, 1894, the draft was delivered by the American Trust and Savings Bank to appellant, and on that day appellee paid \$3500 through the Chicago clearing house to appellant for the draft. This amount was subsequently credited by appellant to the American Trust and Savings Bank.

"February 17, 1894, a question having arisen as to the correct amount of the draft, appellee's officers telegraphed to the Flour City National Bank, and having received an answer went to appellant and made a demand that appellant redeem the draft, leaving the draft with appellant. On the same day appellant, by its second assistant cashier, returned the draft to appellee with

a letter stating that 'American Trust and Savings Bank declines to redeem the same. I will report the matter to Mr. Keith early Monday morning. Kindly return receipt given you.' February 19, 1894, which was the Monday referred to, a representative of appellee had an interview with Mr. Keith, appellant's president, who informed the representative that appellant could not redeem the draft because the American Trust and Savings Bank, under the advice of counsel, refused to redeem it. At the time of these interviews appellee's president knew that appellant cleared for the American Trust and Savings Bank, and testified that the endorsement on the draft so indicated. From February 14, 1894, to February 20, 1894, both days inclusive, it is uncontroverted that the American Trust and Savings Bank at no time had on deposit with appellant less than \$198,000, and on February 19, 1894, when appellant finally refused to redeem the draft, it had to the credit of the American Trust and Savings Bank \$288,018.77.

"At the time of the transactions in question appellee was the Chicago correspondent of the Flour City National Bank of Minneapolis, and the American Trust and Savings Bank not being a member of the Chicago clearing house, checks and drafts drawn upon or deposited with it were cleared through appellant, the same being received by appellant as deposits and credited to the American Trust and Savings Bank, against which account the latter drew. After this draft was received by the American Trust and Savings Bank, endorsed by Harper, it was stamped with the following endorsement, viz.: 'American Trust and Savings Bank.—Paid.....February 14, 1894.—Paid through Chicago clearing house to Metropolitan National Bank.' There is evidence by way of opinions of banking experts tending to show that this endorsement has a significance peculiar to bankers of Chicago; that Chicago bankers generally understood it differently from the common and ordinary meaning of the

words, and to them it signified, in this case, that appellant was agent in the clearing house of the American Trust and Savings Bank to collect the draft. There is also evidence of the same character tending to show that the endorsement has no such peculiar significance to Chicago bankers, and that its significance to them is not different to what it is to laymen or others.

"When the draft was certified by appellee the amount of \$3500 was charged to the Flour City Bank and was afterwards credited back, but whether before or after this suit does not appear. The Flour City Bank disputed the right of appellee to charge it over \$35 because of the change in the draft. Appellee, on March 29, 1894, sued appellant in assumpsit to recover the difference between the draft as originally drawn and the amount of \$3500 paid by it to appellant.

"It is claimed that the trial court erred in denying a motion of appellant, made some weeks prior to the trial, and renewed when the case was called for trial, to suppress the depositions of Harry W. White and A. A. Crane, for the reason that in the depositions both these witnesses testified concerning the original draft, which was then produced and offered in evidence, but, over the objection of appellant's attorneys, a copy instead of the original draft was attached to the depositions. The deposition of White was not offered or read in evidence on the trial. He was called as a witness for appellee, identified the original draft and testified that the body of the draft was in his handwriting,—that he signed it,—and as to the changes made in it after he signed it. After this testimony the draft was offered in evidence and thereafter the deposition of Crane was offered and read.

"It is also claimed that the court erred in refusing to allow appellant to show that in collecting the draft in question appellant acted as the agent of the American Trust and Savings Bank, and that this fact was known to appellee. The only evidence in this regard which it is

claimed the court excluded was an offer by appellant's attorney to show that appellee made a demand on the American Trust and Savings Bank February 17, 1894, for the payment of the draft in question. We think there was no reversible error in this ruling. The proffer was not to show that appellee had this knowledge prior to February 17. Whether appellant was agent or principal can make no difference, because, when demand was made on it by appellee for the payment of the draft, it had ample funds of the American Trust and Savings Bank with which to make the payment. The fact that appellant, when it collected the proceeds of the draft, at once credited the same to the American Trust and Savings Bank is not important. It did not pay merely by making entries on its books. The account was a running account, and the balance on the books of appellant to the credit of the American Trust and Savings Bank was \$198,108.88 on February 17, when demand was first made, and on February 19, when appellant finally refused to redeem the draft, the balance was \$288,018.77. There is no claim that there was any specific payment of this collection by appellant to the American Trust and Savings Bank.

"The further claim is made that the court erred in not directing a verdict for appellant. A motion to that effect was made at the close of all the evidence, and counsel for appellant stated that he had 'a written instruction here, the same as we presented to the court this morning.' The motion was overruled, but the instruction does not appear in the abstract or the record. An instruction in substance directing a verdict for defendant was asked, with other instructions for plaintiff and defendant, upon the merits of the question submitted to the jury."

It is assigned as error that the court gave improper instructions for appellee and refused to give proper instructions asked by appellant.

Appellee filed the common counts, with a special bill of particulars, and appellant pleaded the general issue.



On trial before the court and jury a verdict and judgment were entered for appellee for \$4003.52, from which an appeal was prosecuted to the Appellate Court for the First District, where the judgment of the trial court was affirmed, and an appeal was prosecuted to this court.

MORAN, KRAUS & MAYER, for appellant.

OTIS & GRAVES, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Where a check or draft drawn upon a bank has been fraudulently raised or altered after it was drawn, the rule is well settled that money which has been paid by a bank upon such a fraudulently raised or altered check may be recovered back from the party to whom it was paid, in an action for money had and received, on the ground that the payment was without consideration and made by mistake. The fact that the bank on which it was drawn has certified the check after the change has been made is not conclusive against such bank, nor does it preclude it from showing the fact of such alteration, nor prevent a recovery from the party who received the check on the faith and credit of the certification alone. In 2 Daniel on Negotiable Instruments (sec. 1661) it is said: "Where money is paid by the bank upon a raised or altered check by mistake, the general rule is that it may be recovered back from the party to whom it was paid, as having been paid without consideration; but if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss. This doctrine is clear and is sustained by authority. The bank is not bound to know anything more than the drawer's signature, and in the absence of any circumstance which inflicts injury upon another party there is no reason why the bank should not be re-imbursed. Its certification of the check does not preclude it from show-

ing an alteration, nor does its teller's declaration, after he has examined it, that it is right in every particular."

In 2 Morse on Banking (3d ed. sec. 482,) it is said: "The better doctrine seems to be that certification of a check by a bank is a voucher on the part of the bank only for the facts that the signature is genuine and that there are funds enough to pay the amount for which the check purports to be drawn; that the bank does not warrant the genuineness of the body of the check or of any endorsement upon it; and that if there has been any fraudulent alteration or forged endorsement prior to such certification, the certification, like the payment, is made under a mistake of facts, and as the payment could be recovered back, so the certification is not binding." Many authorities are cited as sustaining this proposition.

In *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, it was held: "When a check is presented for certification to a bank on which it is drawn, the purpose is to ascertain with certainty what the bank alone can know, and that is, whether the drawers of the check have funds sufficient to meet it, and further, to obtain the engagement of the bank that those funds shall not be withdrawn from the bank by the drawers of the check. To this extent the knowledge of the bank enables it safely to go in the way of assertion, and its own power over its own funds will be sufficient to protect it as to its obligation."

In *Security Bank of New York v. National Bank of the Republic*, 67 N. Y. 458, where an action was brought by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the common understanding of banks and merchants the word "certified," at the time of certification, when used in the certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check notwithstanding the body of it was forged, was held to be inadmissible. In such an action the plaintiff was not estopped from alleging the forgery

by the fact that its teller, at the time that the check was presented for certification, upon doubts being expressed in regard to it by the person presenting it, stated that it was right in every particular; that it was no part of the teller's duty to give assurance as to the genuineness of the check except in respect to the signature of the drawer, beyond which the bank was not responsible for his representations.

In *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, it was held (p. 311): "The evidence shows that appellee accepted two of the checks, 'payable through Chicago clearing house,' prior to the time that they were transferred to Chapin & Gore. This makes no difference. An acceptor is bound to look only at the face of the bill or check, and an acceptance never proves an endorsement; and even if the supposed endorsements of the payees of said two checks were on them at the times when they were respectively accepted, yet such acceptances did not admit the handwriting of the endorser. (*Smith v. Chester*, 1 Term Rep. 654; *Robinson v. Yarrow*, 7 Taunt. 455; 2 Eng. Com. Law, 445.) In this case the acceptance or certification of the two checks simply warranted the genuineness of the signatures of the drawer, and that it had funds sufficient to meet them, and engaged that those funds should not be withdrawn from the bank by the drawer, and that the bank would pay, through the agency of the Chicago clearing house, the amount, if any, actually due on the check to the person legally entitled to receive it. The acceptance or certification did not warrant the genuineness of the bodies of the checks, either as to the payees or the amounts, or warrant the genuineness of the endorsements on the checks."

At the time the draft in question was presented to the Merchants' National Bank through the Chicago clearing house it had not only the endorsements of the drawer, but also stamped thereon, "American Trust and Savings Bank.—Paid Feb. 14, 1894.—Paid through Chicago clear-

ing house to Metropolitan National Bank." With these endorsements thereon the draft in question was brought to the Metropolitan National Bank, and the legal effect of the endorsements was that the draft became the property of the latter bank and it owed the amount to the American Trust and Savings Bank. The endorsements were in no way restrictive, and contained no notice that appellant was acting as agent. As held in the case of *Security Bank of New York v. National Bank of the Republic*, *supra*: "The offer to prove that the contract of certification, by local usage or by the understanding of bankers and merchants, had a larger scope and meaning than it had by settled legal construction, was inadmissible.—*Burgett v. Oriental Mutual Ins. Co.* 3 Bos. 385; *Higgins v. Moore*, 34 N. Y. 417; *Lawrence v. Maxwell*, 53 id. 19; *Wheeler v. Newbould*, 16 id. 392."

Whilst a restricted character of endorsement cannot be shown to be different from that under which the endorsement would be held to be by its legal construction, the language of the stamped endorsement indicates that the draft was not deposited for collection, merely, but for the purpose of being deposited to the credit of the American Trust and Savings Bank. The manner of doing business and the large sums kept on deposit with the Metropolitan National Bank by the American Trust and Savings Bank are indicative of such being the purpose and intention,—that it was endorsed for the purpose of collection and deposit, and not for the purpose of collection merely. It was held in the case of *National Commercial Bank v. Miller*, 77 Ala. 168: "When a bank receives from a customer a check on another bank for the special purpose of collection, the title does not pass by the special endorsement for that purpose, nor does the receiving bank hold the amount until the check is collected. But where the customer has a deposit account with the bankers on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to

draw against such deposits, an endorsement of the words 'for deposit' on a check so deposited is, in the absence of a different understanding, presumptive of more than mere agency or authority to collect. It is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority not only to collect but to use the check in such manner as, in their judgment and discretion, having reference to the conditions and necessities of their business, may make it most available to their protection, and they may have it certified by the bank on which it is drawn." The endorsement in that case was as follows: "For deposit.—A. Proskauer & Co., Agents." The court, in defining the legal meaning of the endorsement, say: "The special purpose for which an endorsement for deposit is made, under such circumstances, may be readily inferred. It was a request and direction to the garnishees to deposit the same to the credit of the defendants, and conferred on them not only authority to collect, but also authority to put the check in such form and use it in such manner as in their judgment and discretion, having reference to the conditions and necessities of their business, would make it most available to their protection. The effect of the endorsement for the consummation of this purpose is to vest the garnishees with the title and control of the check. If, in such case, the check is not paid, a banker depends for safety and indemnity on the drawer and the security of the endorsement."

In *Brahm v. Adkins*, 77 Ill. 263, it was held: "The paper introduced in evidence showed merely the fact that defendants were bankers, a deposit with them by plaintiff, and the amount thereof. It was *prima facie* a general deposit. A deposit is general unless the depositor makes it special or deposits it expressly in some particular capacity. (*Keene v. Collier*, 1 Metc. (Ky.) 415; *In the matter of Franklin Bank*, 1 Paige, 249.) This, then, upon plaintiff's own showing, was the ordinary case of a deposit of money

with bankers, and there was an implied undertaking on their part to restore, not the same funds, but an equivalent sum, whenever it should be demanded.—Story on Bailments, sec. 88; *Marine Bank v. Rushmore*, 28 Ill. 463; *Boyd v. Bank of Cape Fear*, 65 N. C. 13.”

The evidence in this case showed that the American Trust and Savings Bank had a deposit account with the Metropolitan National Bank that was a running account, and the amount of deposits between the 14th and 20th days of February is given. The evidence shows that there was deposited in the Metropolitan National Bank to the credit of the American Trust and Savings Bank the following: On the night of the 14th of February, \$338,831.43; on the night of the 15th of February, \$333,668.76; on the night of the 16th of February, \$245,440.25; on the night of the 17th of February, \$198,108.88; on the night of the 19th of February, \$288,018.77; on the night of the 20th of February, \$389,484.18; and there is no evidence to show that the money collected on this draft was paid over to the American Trust and Savings Bank, further than that it was carried into the account between the two banks.

The principle with reference to an agent is, so long as he stands in his original situation, where he has received money by mistake and has done no act on the assumption that the payment was good, and there has been no change of circumstances by reason of his having paid over the money to his principal or nothing done equivalent to it, he remains liable individually. The mere forwarding of the account to his principal and placing the money to his credit are not such circumstances as will relieve him. (Mechem on Agency, sec. 562.) It was held in *Smith v. Binder*, 75 Ill. 492: “When a contract has been rescinded, or a person has received money as agent of another who had no right thereto and has not paid it over, an action may be sustained against the agent to recover the money; and the mere passing of such money

in account with his principal, or making a rest without any new credit given to him, fresh bills accepted or further sums advanced to the principal in consequence of it, is not equivalent to a payment of the money to the principal."

The endorsement by Harper, with the American Trust and Savings Bank, was expressly an endorsement for a deposit to the credit of the endorser when the same should be collected. It reads: "For deposit in the American Trust and Savings Bank.—Credit of Frank H. Harper." Neither that endorsement nor the stencil stamp of the American Trust and Savings Bank can be construed to be other than an unconditional deposit. Whatever the relation was between the Metropolitan National Bank and the American Trust and Savings Bank, there is no evidence that the relations between the two banks were disclosed to the Merchants' National Bank or that it had knowledge of any fact of the agency. It is said in 2 Morse on Banking (sec. 577): "But where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposit, an endorsement of the words 'for deposit' on the checks so deposited is, in the absence of a different understanding, presumption of more than mere agency or authority to collect. It is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority not only to collect but to use the check in such manner as in their judgment and discretion, having reference to the condition and necessities of their business, may make it more available in their possession, and they may have it certified by the bank on which it is drawn." Neither the endorsement and transfer of the draft by Harper to the American Trust and Savings Bank nor by that bank to the appellant constituted a restricted endorsement, disclosing the relation of agency on the part of the appellant, and for collection only.

As to the question with reference to the giving and refusing of instructions, we adopt the reasoning and concur in the conclusions reached by the Appellate Court, as follows:

"The first instruction given for appellee is claimed to be erroneous in that it fails to contain two facts essential to recovery by appellee, namely: First, the necessity of offering to return the draft and of proving that appellee had a claim at the time of the commencement of this suit; and second, that in the collection of the draft appellant acted as agent of the American Trust and Savings Bank, and paid over the money before receiving any notice that the draft had been altered or any demand for the re-payment of the money. The instruction is, namely:

"1. The jury are instructed that if they find, from the evidence, that the Flour City National Bank of Minneapolis, on or about the seventh day of February, 1894, issued its draft upon the plaintiff for the sum of \$35, payable to the order of Frank H. Harper, and delivered it to him for that sum, but afterwards the said draft was fraudulently altered and raised by said Frank H. Harper, or some person unknown, so that it purported to be drawn for the sum of \$3500 instead of for the sum of \$35 only, without the knowledge or consent of the said Flour City National Bank, the drawer thereof, and that afterwards the said draft so fraudulently raised and altered, as aforesaid, was presented to the plaintiff for certification and acceptance, and that thereupon the said plaintiff, by its duly authorized agent in that behalf, without knowledge that said draft had been changed or altered, endorsed upon said draft the following words: 'Accepted, payable through Chicago clearing house, February 13, 1894, when properly endorsed.—Merchants' National Bank, by Philip P. Lee, teller,' and that the said draft was by the said Frank H. Harper deposited for credit in the American Trust and Savings Bank of Chicago, and that the same was by said American Trust and Savings Bank endorsed



and delivered to the defendant, and that afterwards said plaintiff paid to the defendant, in the usual course of business, the full sum of said \$3500, being the amount of said draft after the same had been so fraudulently changed and raised as aforesaid, instead of the sum of \$35, being the sum for which said draft was actually drawn, without knowledge of the fact that it had been so raised and changed, and that subsequently, and within a reasonable time after the discovery of the fact by the plaintiff that said draft had been fraudulently changed and altered, as aforesaid, from \$35 to \$3500, (if the jury find, from the evidence, that it had been so fraudulently changed and altered,) demand was made by the plaintiff on said defendant for re-payment of said amount so received and collected on said draft in excess of \$35, the sum for which it was originally drawn, and that payment thereof by said defendant was refused, then the jury are instructed that the plaintiff had a right to recover of the defendant in this action the sum of \$3465. The jury are further instructed that in case they find, from the evidence, the plaintiff is so entitled to recover from said defendant the sum of \$3465, and if they further find, from the evidence, that there has been unreasonable and vexatious delay in the payment of the same by the said defendant to the said plaintiff, they may allow interest thereon at the rate of five per cent per annum.'

"When appellant was requested to redeem the draft by appellee the draft was turned over to appellant and by it retained until it had made investigation, whereupon, having refused to redeem the draft, appellant returned it to appellee, and cannot be heard now, in the face of these facts, to claim that appellee should again offer to return the draft; and, moreover, no tender of the draft was necessary after a formal demand was made for its payment and a refusal to pay by appellant. *Brewster v. Burnett*, 125 Mass. 68.

"Whether appellee charged or credited the Flour City National Bank with the amount of the draft was immaterial. The facts, as shown by the record outside the book-keeping of appellee, fix the rights of appellee and the Flour City Bank. When appellee accepted the draft under the circumstances shown, it became liable to pay it, and when the draft was paid and the forgery afterwards discovered, appellee could rightfully charge the Flour City Bank only the amount for which the draft was originally drawn, and it could make no difference, as between the Flour City National Bank and appellee, whether appellee credited on its books the proper amount before or after this suit was commenced. *Brewster case, supra.*

"What has been said in regard to the agency of the appellant, and notice to appellee of such agency, disposes of the remaining contention as to this instruction. Under the evidence, so far as concerns the alleged agency, the court might well have instructed a verdict for appellee instead of submitting the matter to the jury. We see no error in the instruction. The same contention is made by appellant as to instructions 2 and 3 given for appellee. It is unnecessary to set them out. We think there was no error in giving them.

"The court also refused twenty-four other instructions asked by appellant, and gave for appellee instructions Nos. 4, 6 and 7, of which complaint is made, but in what respect there was error in refusing or giving any of these numerous instructions counsel have not attempted, by their brief, to point out, and we do not feel called upon to consider them further than to say we have examined the instructions given for appellee and appellant, and being of the opinion that the jury was fully instructed on the questions at issue and that the record presents no reversible error, the judgment will be affirmed."

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THE CITY OF CHESTER

v.

## THE WABASH, CHESTER AND WESTERN RAILROAD CO.

*Opinion filed October 16, 1899—Rehearing denied December 15, 1899.*

1. **EJECTMENT**—*city may bring ejectment to recover fee of public street.* It is a presumption of law that the fee of a public street is in the city, and ejectment may be resorted to as a proper remedy to recover the same from one who encroaches thereon.

2. **MUNICIPAL CORPORATIONS**—*limit of time railroad may use street is fixed by the property owners' petition.* A city council, without right to grant the use of a street for railroad purposes except upon the petition of a majority of the property owners, as specified in paragraph 90, section 1, article 5, of the City and Village act, (Rev. Stat. 1874, p. 223,) is bound by a limitation imposed by the terms of the petition as to the length of time the street is to be used.

3. **SAME**—*right of railroad company to lay tracks under grant of council is not a franchise.* The right granted by a city council to a railroad company to lay its tracks in a street and operate its cars thereon is not a franchise but a property right merely contractual, and subject to the same conditions, restrictions and limitations as any other private property.

4. **RAILROADS**—*when railroad cannot claim that property owners are estopped to assert a time limitation.* A railroad company, by the expenditure of large sums of money or by procuring leases of additional property, cannot claim that abutting property owners are estopped from asserting a limitation as to the length of time the public street was to be occupied by tracks, contained in the petition which originally conferred power upon the city council to act, and under which, only, the railroad company took its rights.

APPEAL from the Circuit Court of Randolph county; the Hon. B. R. BURROUGHS, Judge, presiding.

The appellant brought its action of ejectment against the appellee to recover possession of certain premises in the city of Chester, described as "all that part of Water street lying between Angle street and Pine street, occupied by the defendant as and with a railroad track and claimed by the appellant in fee," after demand in writing for the possession thereof. The appellee claims the right to the premises in question under certain proceedings of

the city council of Chester had November 20, 1877, granting certain rights to the Chester and Kaskaskia Railroad Company, to the rights of which company the appellee claims to have lawfully succeeded.

On November 20, 1877, a special meeting of the city council of Chester was held, for the purpose, as shown by the minutes, of taking action "on the extension of railroad facilities to the Southern Illinois penitentiary," then being constructed near the city of Chester. A petition bearing twenty signatures, being the owners of a majority of the property fronting on Water street, was at this meeting presented to the council, requesting it to grant the right to lay a railroad track along Water street, in front of their property, to the Chester and Kaskaskia Railroad Company, from the intersection of Hancock street with Water street and along said Water street to the western limits of the city, for the term of twenty years. On the reading of this petition, a former ordinance, being ordinance No. 36, granting the right of way to C. B. Cole and associates to lay down a single track over the property in question, was repealed, and ordinance No. 37 was adopted by unanimous vote of all present. This ordinance contains recitals in its preamble that the construction of the penitentiary makes it necessary to extend the railroad through the city from the terminus of the Iron Mountain, Chester and Eastern railroad to a point north of the city; that the Chester and Kaskaskia Railroad Company had been organized for that purpose and had surveyed its railroad along Water street, and that the owners of more than one-half of the land fronting on Water street had petitioned the council to grant the right of way over Water and other streets, from Hancock street to the northern limits of the city, for the term of twenty years. Section 1 grants the right to the Chester and Kaskaskia Railroad Company to lay down, construct and maintain its railroad from the terminus of the Iron Mountain, Chester and Eastern rail-

road across Hancock street, on and along Water and Front streets, to the northern limits of the city of Chester, to use no more of such streets than is necessary to construct and operate said railroad, and provides that the railroad company shall conform to all grades now or hereafter established for said streets, and shall construct its track in such a manner that teams, etc., may cross and re-cross same, and makes the company amenable to all ordinances now or hereafter in force. The words "for a period of twenty years" appear in the proceedings as interlined in red ink, and oral testimony was introduced to prove by some of the signers of the petition that they signed it with the distinct understanding that it was for the period of twenty years only.

It was stipulated that the Chester and Kaskaskia Railroad Company was incorporated October 25, 1877, for a period of fifty years, and that the appellee acquired all its property rights April 27, 1878.

On March 15, 1881, the city of Chester leased to the appellee a part of the levee between Water street and the river, extending to low-water mark, and between Angle street on the north and McFerron street on the south, for ten years for a rental of \$50 per annum, for the purpose of maintaining a coal dump and for the mooring of boats, etc., with the right to cross all streets and alleys necessary. On April 6, 1891, another lease was entered into between the same parties, the city acting under authority of an ordinance passed for that purpose, leasing to the railroad company "that part of the levee and wharf or landing lying between Angle street and the north side of Erskin street and extending to low-water mark of the Mississippi river," and authorizing the railroad company to take possession of the same for the purpose of erecting, maintaining and operating a transfer incline and cradle for the purpose of transferring cars to boats; also a coal dump, and for mooring boats, etc., and the right to use all streets lying between the present

track of the railroad company and the levee as may be necessary for the storage, handling or transfer of cars and operating the coal dump, for the period of thirty-seven years, at an annual rental of \$50 per annum.

The appellee, shortly after the making of the lease, constructed the cradle referred to, with tracks and approaches thereto, without protest or interference by the city or any of the citizens, and it claims that the property in question in this suit is necessary to the maintenance of the same, and that the city is estopped, by reason thereof, from asserting claim to the property in question, and that the rights given by the ordinance of date November 20, 1877, inured to it for the full term of the corporate existence of the charter of the Chester and Kaskaskia Railroad Company, and not for twenty years only. On trial before the circuit court the contention of appellee was sustained, and a finding and judgment were entered accordingly, from which this appeal is taken.

The plaintiff asked the court to hold, as a matter of law, that the owners of property abutting on the street, when they signed the petition to the city council to grant the railroad company the privilege of laying its railroad track on the street and maintaining a railroad thereon, had the right to impose any condition they saw fit, and by their petition limited the grant for the term of twenty years, and that the city council was bound by the terms of the limit so imposed. Further, that, as a matter of law, the ordinance under which the defendant claims the right to maintain its railroad tracks on the street, limits the right to the term of twenty years from the time the ordinance took effect. These propositions the court refused to hold, to which plaintiff excepted. Thereupon the defendant asked the court to hold, as propositions of law, that the owners of property abutting a street, in a petition to a city council to permit a railroad company to occupy a street with its tracks, have no power to impose a limit as to time inconsistent with the duty of the

railroad company to properly serve the public during the term of its chartered existence. Further, that the city may, and should, disregard any limitation contained in the petition which, if enforced, would prevent the railroad company from exercising its functions or performing its duties to the public during the term of its chartered existence; that the recital in the preamble of the petition as to the contents and terms thereof is immaterial, and the ordinance is to be construed without reference to such recital or to the facts therein stated; that the ordinance cannot be controlled or modified by recitals contained in the preamble, and that the ordinance is to be construed as granting the right of way to the railroad company to lay its tracks in the street and maintain the same for the whole term of the corporate life of the railroad company, inasmuch as the ordinance itself is silent as to the length of time of the grant. These propositions requested to be held by the defendant were by the court so held, to which the plaintiff then and there excepted.

DILL & WILDERMAN, ALEXANDER HOOD, and WILLIAM M. SCHUWERK, for appellant.

G. W. WALL, and H. CLAY HORNER, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Water street, in the city of Chester, being admitted to be a public street therein, it is a presumption of law that the fee of the street is in the city, and ejectment may be resorted to as a proper remedy to recover the same from one who encroaches thereon. The title of the street being in the city for the use of the public, it may not grant the use of that street inconsistent with the rights of the public therein.

At the time the ordinance in question was adopted, paragraph 90 of section 1 of article 5 of chapter 24 of the Revised Statutes was as follows: "The city council or

board of trustees shall have no power to grant the use of, or the right to lay down any railroad tracks in, any street of the city to any steam or horse railroad company except upon a petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes." No right existed in the city council to grant the use of the street for the purpose of laying down railroad tracks by this railroad company except upon the presentation of a petition as provided for by the foregoing paragraph. It was held in *Byrne v. Chicago General Railway Co.* 169 Ill. 75 (on p. 85): "Where, as here, the constitution and general statutes of the State make the consent of the municipal authorities a condition precedent to the exercise of the right to construct and operate a railroad in the streets of the city, such authorities necessarily had the power to prescribe the conditions upon which they will grant their consent. They may impose any conditions not illegal and not forbidden by statute."

Inasmuch as the city council can only act on the petition of the owners of land fronting on the street, it can not create conditions to the prejudice of such land owners to a broader extent than authorized by the petition itself, and as the basis of the action by the city council is the petition of the property owners fronting on the street, such property owners may, with reference to the time the street is to be used, impose such terms by their petition as in their judgment will best subserve their and the public interests, and may limit the time that the right granted shall continue, and such limitation will be binding on the city council.

In *McCartney v. Chicago and Evanston Railroad Co.* 112 Ill. 611, where an act of the legislature of 1865 confirmed an ordinance of the city of Chicago granting to a railway company chartered by special act the right to lay a track on and over certain streets of the city for passenger cars only, and the city subsequently became incorporated un-



der the general act containing the provision of section 90 as hereinbefore cited, and the railroad company subsequently desired consent to use the tracks for street cars also, and urged that the consent required by the city council is only as to the laying down of tracks and not as to the use of tracks which had been constructed, and that in case of a railroad track once rightfully laid there is no restriction upon the city as to the granting any use of it, with reference to that proposition the court held (p. 638): "This we regard a too strict interpretation of the provision in question. Where a railroad company lays its tracks in a street, having but the right to construct and maintain a track for passenger cars only, we think that under this provision of the statute the city has no power afterwards to grant the use of the track for the operation of freight cars upon it, except upon petition of property owners upon the street, as named in the statute. The granting of the use of freight cars upon a track which was one for passenger cars only, would, we consider, within the intendment of this statute provision, be tantamount to granting the right to lay down a track for freight cars, and so come within the provision. But if the grant of this use for freight cars be unauthorized, it is objected that the complainants in this case have no right to any relief as to the use of freight cars in Hawthorne avenue; that the city has the exclusive control of the streets and represents the public in all matters concerning them, and that no complaint can be made other than by the city, or by the abutting property owners whose consent should have been obtained. Where this required consent has not been obtained the city is absolutely without power to grant the license, and the exercise of it would be wholly without warrant, and unlawful."

In *People ex rel. v. Chicago West Division Railway Co.* 118 Ill. 113, where certain conditions were sought to be inserted in the petition of property owners, this court said (p. 120): "It is true that the property owners might have

inserted such conditions in their assent as they thought proper, and the common council might have been powerless to grant the railway company permission to occupy the streets except upon the conditions specified by the property owners in their consent." To the same effect are *Chicago, Danville and Vincennes Railroad Co. v. City of Chicago*, 121 Ill. 176, and *Hunt v. Chicago Horse and Dummy Railway Co.* 121 id. 638.

The right granted by a city council to a railroad company to lay its tracks in a street and operate its cars thereon is not a franchise but a property right merely contractual, and subject to the same conditions, restrictions and limitations as any other property owned by other persons. (*City of Belleville v. Citizens' Horse Railway Co.* 152 Ill. 171; *Byrne v. Chicago Railway Co. supra.*) And such contract rights, so far as they affect the public, are to be strictly construed in favor of the public. The city council having no power to permit the use of its streets by a railroad corporation without the necessary petition, as required by paragraph 90 heretofore cited, and a right to a limitation existing with reference to the property owners by incorporating in their petition a limitation of the extent to which the city council should go in conferring such power on the railroad corporation, and the power conferred by the city council being a mere contractual right, to be strictly construed so far as it affects the public, it must necessarily be construed as not going beyond the limits fixed by the petition of the abutting property owners. The petition in this case asked that the right be granted to use the street for a period of twenty years, and when the city council made its grant by ordinance, which was accepted by the railroad company, the council was powerless to make the grant for a longer period than twenty years, and on no principle of construction can it be held that the railroad company, by reason of any expenditure of money thereon or by procuring leases of additional property, could place itself in

a position to assert a claim that abutting property owners were estopped from asserting their rights in strict accordance with the petition which originally conferred the power on the city council, and under which, only, the railroad corporation took its rights. The railroad corporation was bound to know the law—that the power of the city council was dependent on the presentation of the petition; and the petition itself limiting the time for which the street should be granted to the railroad company, the latter is presumed to have had full notice of all that the petition contained.

It follows, therefore, that the circuit court erred in refusing to hold propositions asked by the plaintiff and in holding propositions asked by the defendant. The plaintiff was entitled to recover on the facts appearing on this record.

The judgment of the circuit court is reversed and the cause is remanded.

*Reversed and remanded.*

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THE PEOPLE, for use of John A. Sterling, Admr.

v.

PRESTON HUFFMAN *et al.*

*Opinion filed October 16, 1899—Rehearing denied December 13, 1899.*

1. EXECUTORS AND ADMINISTRATORS—*liability of sureties cannot be extended by implication.* Sureties who execute the statutory bond of an executor or administrator do so with reference to existing laws fixing their liabilities and prescribing the duties to be performed by executors, and their contract is to be construed strictly, and cannot be extended beyond its terms by implication.

2. SAME—*effect of statutory mention of matter requiring special bond by executor.* Special mention, by statute, of one matter to be covered by a particular bond to be given by an executor, indicates that it was not intended to be covered by a general provision in another bond which would otherwise be applicable.

3. SAME—*section 7 of Administration act of 1881 construed.* The provision of section 7 of the Administration act, as amended in 1881,

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191	*514

(Laws of 1881, p. 1,) that an executor's bond shall be in double the value of the personal estate and that a further bond be given in case of the sale of land either under the will or order of court, precludes liability of sureties on the executor's bond for his failure to faithfully perform his duties upon a sale of real estate.

4. SAME—*an executor selling real estate for re-investment acts as trustee and not as executor.* A testamentary power to sell real estate, conferred upon an executor for the sole purpose of re-investment, is not the discharge of a duty as executor for which his general bondsmen are liable, but the discharge of a duty as trustee.

5. SAME—*when sureties on general bond are not liable for administration of proceeds of real estate.* Real estate changed into money by virtue of a power in the will is not personal property, for the faithful administration of which the sureties on the executor's general bond are responsible.

6. SAME—*executor's report not conclusive on sureties if not approved by court.* The report of an executor showing a certain balance in his hands as of the date of the report is not conclusive on his sureties in an action to enforce their liability on the bond, when the report was not approved by an adjudication of the court.

7. SAME—*executor must give separate bond on selling real estate though land lies outside the State.* The bond required to be given by section 7 of the Administration act, as amended in 1881, to secure the proceeds of land sold by an executor under the terms of the will or by decree of court, must be given as a separate bond to secure such fund, whether the land lies within or without the State.

8. SAME—*general bondsmen are not liable for acts of executor requiring a special bond.* The general bondsmen of an executor or administrator are not liable for his acts in discharge of an official duty of a special nature, for the faithful performance of which he is required by law to give a special bond.

9. APPEALS AND ERRORS—*when Supreme Court may examine stipulation of facts on appeal from the Appellate Court.* The judgment of the Appellate Court containing no finding of facts is not conclusive upon the Supreme Court, where the former remands a cause with specific directions upon a record containing stipulated facts merely, but the Supreme Court will examine the stipulation to see whether the judgment is warranted by the law.

CARTWRIGHT, C. J., and WILKIN and BOGGS, JJ., dissenting.

*Huffman v. People, for use, etc.* 78 Ill. App. 345, reversed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of McLean county; the Hon. JOHN H. MOFFETT, Judge, presiding.

This action was brought against the defendants, as sureties upon the bond of Joseph Wilson, executor of the last will and testament of Isaac Wilson. The bond is in strict accordance with the form prescribed in section 7 of chapter 3 of "An act in regard to the administration of estates," approved April 1, 1872, in force July, 1872. The bond was in the penal sum of \$8000, the estimated amount of double the value of the personal property. The executor and one of his three co-sureties are dead, and a suit is brought by plaintiff in error, who was appointed administrator *cum testamento annexo*, against the surviving sureties to recover for an alleged breach of that bond.

Joseph Wilson was appointed executor of the following will of Isaac Wilson, deceased:

"*First*—I request and direct that my executor shall sell the land owned by me and described as follows: The north one-half of section 34, town No. 100, north, range 44, west of the fifth principal meridian, in Lyon county, Iowa, and invest the proceeds in land in McLean county, Illinois, to the best of his judgment, for the benefit and use of my wife, Louisa Wilson, during her life and so long as she shall remain a widow, and after her decease or re-marriage the same to be equally divided between the surviving heirs of my body.

"*Second*—I request and direct that my executor shall collect all notes and accounts due or owing to me, of whatever kind or nature, and the amount so collected, together with the money I may leave at my death, amounting to the sum of \$4000, and invest the said moneys in lands in McLean county, Illinois, as his best judgment may direct, for the use and benefit of my wife during her life and so long as she shall remain a widow, and after her death or re-marriage the same is to be equally divided between the heirs of my body.

"*Third*—I give and bequeath all the rest, residue and remainder of my personal property, of what nature or kind soever, to my said wife, Louisa Wilson.

"*Fourth*—I hereby appoint Joseph Wilson the sole executor of this will, revoking all former wills by me made.

"In testimony whereof I have hereunto set my hand and seal this 19th day of May, A. D. 1887."

Said will was probated September 28, 1887, and Joseph Wilson qualified as executor of the same, gave the bond sued on October 4, 1887, took the oath required by statute, entered upon the duties of his office, and continued to act until the time of his death, for more than seven years. During that time he filed three reports of his acts and doings as such executor, the last one dated January 12, 1894, and by this report shows that there was in his hands at that time, as such executor, \$3938.68. On March 13, 1889, more than seventeen months after his appointment, Wilson filed his inventory showing property estimated at \$8627.61, but on which he realized something less than \$8000, which, together with rents and interest reported, amounted to \$9000.85. In his report he itemized the receipts, but reported all moneys, whether the proceeds of personalty or realty, as a single fund in his hands as executor, and paid out of this fund, regardless of whence it came, all items of expenditures, leaving in his hands as such executor at the date of and as per his last report, January 12, 1894, the sum of \$3938.68 aforesaid.

The plaintiff seeks to recover \$3938.68 balance, with interest thereon, proceeds of real estate sold October 30, 1890, by the executor under the foregoing provisions of the will. This balance was the entire amount after allowing the executor all credits claimed in each report, including \$1498.04 expended in the purchase of real estate in Colfax, Illinois. It does not appear that the expenditure was questioned in any manner in either the county, circuit or Appellate Court.

The case was tried below on a stipulated statement of facts, with all proper counts, pleas and replications considered filed. That stipulation contains the record and reports in full of the probate court. A summary of

such facts shows: (1) the debts are paid; (2) widow's award also paid; (3) the \$300 worth of household goods delivered under the third clause of the will; (4) that the personal property, including household goods, amounted to about \$3692.28, the Iowa land sold for \$4480, and the rentals therefrom collected of \$180.82; (5) that the debts paid, the widow's award, \$300 worth of personal property, and the sum invested in real estate at Colfax, in McLean county, amounted to about \$4509.34; (6) that the executor was appointed and qualified October 25, 1887, and died on September 17, 1894, and his report shows that he did not re-invest the proceeds of the Iowa land, and that he paid out \$817.08 more than all the personal property left by the testator; (7) that in the executor's last report he treats the real estate proceeds as a trust fund; (8) that the total received by the executor from all sources was \$9000.85, of which \$672 was interest upon \$4480, the price realized from sale of Iowa lands, with which the executor was required by the county court to charge himself in his last report; (9) that the only investment in real estate made by the executor was the purchase of a home for the testator's widow and children in Colfax, McLean county, Illinois, which investment was made long prior to the sale of the Iowa real estate, in the purchase and improvement of which he paid \$1198.04 before anything was realized from the Iowa land, the remaining \$300 purchase money of Colfax property being paid by the executor March 5, 1891.

The proceeds of the Iowa real estate (\$4480) were not received, as shown by the executor's reports, until October 30, 1890. Before that time the executor had paid out \$3730.25. The executor paid out for real estate at Colfax, in McLean county, \$1498.04, of which all but \$300 was paid before October 30, 1890, when the proceeds of the Iowa real estate were received.

No duty of the executor with reference to the payment of debts, legacies, widow's award, or to the administra-

tion of the personal property of said estate, was left unperformed. The controversy arises over the construction of the law as to the effect of this bond—as to whether the surviving sureties thereon are to be held liable for the proceeds of the real estate situated in the State of Iowa. The plaintiff in error contends that the bond given under the provisions of section 7 of the act above cited makes the sureties thereon liable for the proceeds of the real estate so directed to be sold and to be re-invested in real estate in McLean county. The defendants contend that the bond does not cover such real estate directed to be so sold and re-invested.

On the hearing defendants' counsel submitted five propositions to be held by the court as the law of the case. These were to the effect that the bond sued on was given to secure the proper administration of the personal estate of the testator, and did not secure the proceeds of the sale of real estate authorized to be sold by the terms of the will. All of these propositions were refused by the court, to which refusal defendants excepted, and thereupon the court of its own motion prepared and held seven propositions as the law in the case, to the effect that under the bond in this case the defendants, as sureties, were liable not only for any misapplication or misappropriation of funds arising from the maladministration of the personal estate of the intestate, but also for any funds that came into the hands of their principal as such executor, and by him misappropriated; that the law of Iowa, as to the real estate in Iowa in regard to which the principal in the bond in suit was authorized to act under the will, must be held to apply, and that the law of the State of Illinois, in regard to giving further and additional bond in case of sale of real estate, did not apply; that where an executor, by virtue of the power vested in him by the will, is charged with duties that might more properly belong to a trustee, yet when he qualifies as executor and attempts to carry out the trusts created by a



will he will be held to do so in his capacity as executor until he renounces as executor and qualifies as trustee, and for any waste or embezzlement before qualifying as such trustee the sureties on his executor's bond will be liable. To each proposition so held the defendants then and there excepted.

The trial court entered judgment for plaintiff in error in debt for \$8000, to be satisfied by the payment of damages assessed at \$4230.83. On a writ of error sued out from the Appellate Court a judgment was entered reversing and remanding the judgment of the circuit court of McLean county, with instructions to the latter court to find for the plaintiff in error in debt for \$8000, to be satisfied by the payment of damages assessed at \$724.13, with lawful interest thereon from January 24, 1894, to the date of finding. A writ of error was sued out from this court to the Appellate Court on that record, and the plaintiff in error assigned as error that the Appellate Court erred in holding the executor's bond did not cover the proceeds of the Iowa land and in reducing the amount of damages. The defendants in error assigned as cross-errors that the Appellate Court erred in finding any sum of money due on said bond.

WELTY & STERLING, for plaintiff in error:

An administrator *de bonis non* may have and maintain all necessary and proper actions against the securities on the bond of his predecessor for any and all of the estate which may have come to the hands of such predecessor and is withheld, or may have been wasted, embezzled or misapplied and no satisfaction made for the same. Hurd's Stat. 1887, chap. 3, sec. 37; *Nevitt v. Woodburn*, 160 Ill. 203.

The statute, prior to 1881, provides that the executor shall enter into bond in double the value of the estate. The present statute provides that the executor shall enter into bond in double the value of the personal estate,

and where real estate is sold to pay debts or by the terms of the will, he shall give a further and additional bond in double the value of the real estate, in the same form as the first bond. This is the only change made. It only affects the amount of the bond to be given—not the terms or conditions.

The sureties on the original bond are liable for the waste, mismanagement, etc., of the estate by the executor, whether it be proceeds of personal or real estate, to the amount of the bond. *Evans v. Gerkin*, 105 Cal. 311.

Sureties are bound by the report of the executor, and are estopped from denying that he had a balance in his hands, as such executor, according to and at the date of his report. *Doll v. People*, 145 Ill. 253; 48 Ill.App. 418; *Chicago v. Gage*, 95 Ill. 593; *Cawley v. People*, id. 249; *Morley v. Metamora*, 78 id. 394; *Wadsworth v. Connell*, 104 id. 369; *Longan v. Taylor*, 130 id. 412.

SAMPLE & MORRISSEY, for defendants in error:

The bond signed by the defendants secured only personal property, and was given in double the value of such property. *Starr & Cur. Stat. chap. 3, sec. 7, p. 195.*

The bond, being only in double the amount of the personalty, shows it was not intended to cover real estate. *Jones v. Hobson*, 2 Rand. 497.

The laws in force at the time of the making of the contracts form a portion of their essence, and they must be considered as entered into with reference to such laws, and be so construed. *Reynolds v. Hall*, 1 Scam. 36.

The statute mandatorily provides when an executor is required by will to sell real estate the court shall require him to give a further and additional bond in double the value of such real estate, the same as when real estate is required to be sold to pay debts. *Starr & Cur. Stat. chap. 3, secs. 7, 23.*

The liability for sale of real estate rests on such additional bond, where sale was not made to pay debts or

legacies. *Madison County v. Johnston*, 51 Iowa, 152; *Bruce v. Bruce*, 65 id. 106; *Robinson v. Millard*, 133 Mass. 236.

Such additional bond is not subsidiary, but is independent of the bond given to secure the personal estate. *Robinson v. Millard*, 133 Mass. 236; *Bruce v. Bruce*, 65 Iowa, 106; *Morris v. Cooper*, 35 Kan. 156; *Warwick v. State*, 5 Ind. 350; *Henderson v. Cooper*, 4 Nev. 429; *White v. Ditson*, 140 Mass. 351.

The requirement of such additional bond shows the sureties on the personal property bond did not contemplate, and did not agree to be liable for, proceeds of real estate. *Madison County v. Johnston*, 51 Iowa, 152; *Bruce v. Bruce*, 65 id. 106.

The fact that the additional bond was not given does not affect the question, or create a liability where such liability would not have existed on the first bond if such second bond had been given. *Bruce v. Bruce*, 65 Iowa, 106.

Where a separate bond is required to be given by a guardian on the sale of a ward's real estate, it has often been held that the sureties on the general bond are not liable for the proceeds of sale of such real estate. See Iowa cases above cited; *Henderson v. Cooper*, 4 Nev. 429; *Warwick v. State*, 5 Ind. 350; *Morris v. Cooper*, 35 Kan. 156.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Where one is appointed to an office, such as executor, administrator or guardian, as to which certain duties are prescribed by statute and for the performance of which he is required to give a bond with security, it is a general rule that when that officer is further required to discharge official duties which are special in their nature and for the faithful performance of which he is required to give a special bond, in the absence of any declaration in or provision of a statute that the general bondsmen shall be liable for the faithful discharge of the special duty no liability can be held to attach for which they would be

liable on their general bond. (*Board of Supervisors of Milwaukee County v. Ehlers*, 45 Wis. 281; *Crumpler v. Governor*, 1 Dev. 52; *Governor v. Barr*, id. 65; *Governor v. Matlock*, id. 214; *Waters v. State*, 1 Gill, 302; *Commonwealth v. Toms*, 45 Pa. St. 408; *State v. Corey*, 16 Ohio St. 17; *People v. Moon*, 3 Scam. 123; *State v. Johnson*, 55 Mo. 80; *United States v. Cheeseman*, 3 Sawyer, 424; *State v. Young*, 23 Minn. 551; *Henderson v. Coover*, 4 Nev. 429; *Lyman v. Conkey*, 1 Metc. 317; *Williams v. Morton*, 38 Me. 52.) Under that principle, where a bond is given by a guardian on assuming the duties of his trust, which was designed to secure the faithful appropriation and investment of the personal estate of the ward, including the rents of the real estate, the sureties on such general bond were held not responsible for the misapplication of money received on the sale of real estate, where the statutes required that another bond should be given as security for the safe keeping of the purchase money received on the sale of the real estate, and where such real estate was sold without such bond having been given. *Warwick v. State*, 5 Ind. 350; *Williams v. Morton*, *supra*.

In *Morris v. Cooper*, 35 Kan. 156, it was held with reference to the liability on the general bond of a guardian, that he (the guardian) "simply takes charge of the personal property and the rents and profits of the real estate; and this is all that the bond is intended to cover. If it should be desired that the guardian should sell any portion of the real estate for his ward he must first procure a special order for that purpose; and he must then, before he sells any of the real estate, execute another bond to the satisfaction of the probate court, in the penal sum of at least double the value of such real estate; and the sureties on the general bond given at the time of the appointment of the guardian will have a right to suppose that the guardian will never be permitted to sell any of the real estate before he executes and files the special bond required by section 15."

In *Williams v. Morton*, *supra*, it was held: "It could not have been designed by the legislature that a bond given for the faithful discharge of the duties of guardian, which by his letters of guardianship he is bound to perform, should be the security for the observance of the provisions of a sale of real estate and the proper application of the proceeds, when the sale was under authority of a special license only, and a special bond is required that the duties to be done under that license as the law prescribes shall be faithfully performed. The proceedings under the license, as required by the statute, are not, strictly speaking, guardian duties, but, as matter of convenience, the change of the real estate of the ward into money is to be done by him who has the charge of the former, and who is to see that the latter is properly secured upon interest." To the same effect is *Madison County v. Johnston*, 51 Iowa, 152, and *Bunce v. Bunce*, 65 id. 106.

The additional bond that is required where a sale of real estate is authorized by will or decree of court is not a subsidiary bond or one additional to the first, but concerns a different subject matter in dealing with the estate of a deceased person, and the two bonds may well co-exist as securities for distinct liabilities. (*Robinson v. Millard*, 139 Mass. 236; *White v. Ditson*, 140 id. 351; *Bennett v. Overing*, 16 Gray, 267.) Where a bond is given for a specific object, general words can be construed only with reference to that specific object. (*Crumpler v. Governor*, *supra*.) Where the condition of a bond has appropriate words to secure the performance of a certain class of duties imposed by law on such officer, even though there be general terms superadded which could include all his official duties, it would not extend the liability of a surety to other duties for which, by law, a separate bond is directed to be given but which direction has not been complied with. *Governor v. Matlock*, *supra*.

By section 7 of the act with reference to the administration of estates it is provided that all executors, unless

the testator shall otherwise direct, shall, before entering upon the discharge of their duties, enter into a bond, with good and sufficient securities, in a sum double the value of the personal estate. By section 6 of the same chapter the form of the oath to be taken by the executor at the time letters testamentary are granted is prescribed, and by that oath the executor swears that he will "well and truly execute the same by paying first the debts and then the legacies mentioned therein, as far as his goods and chattels will thereunto extend." By this legislation it is apparent that the executor is to administer with reference to the personal estate only, and his bond being in double the value of the personal property only, the idea is excluded that the duties of the executor include the sale of real estate under the bond thus required,—and this was expressly held in *Jones v. Hobson*, 2 Rand. 483.

The law providing for the discharge of the duties of the executor with reference to the personal estate is necessarily taken notice of by the sureties when they execute the bond, and the bond is executed in connection with the provisions of the statute, and the liability of the sureties is made with reference to the law as it exists at the time of the execution of the instrument and with reference to the duties to be performed by the executor as prescribed by the law so existing. The contract of a surety is to be construed strictly, both in law and equity, and his liability is not to be extended, by implication, beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation is he bound, and no further.

By the provisions of section 7 of chapter 3, as amended by the act of May 30, 1881, after providing for the form of the bond of the executor, as herein before stated, and requiring it to be in double the value of the personal estate, it is then provided that "where it becomes necessary to sell the real estate of any intestate for the payment of debts against his estate, under the provisions of this act,

or in case real estate is to be sold under the provisions of a will, the court shall require the executor (or administrator) to give further and additional bond, with good and sufficient security to be approved by the court, in a sum double the value of the real estate of the decedent sought to be sold, and payable to the People of the State of Illinois, for the use of the parties interested, in the form above prescribed."

Under this one section of the act the general enactment with reference to the form of the bond to be given by the executor could, in its most comprehensive sense, be held to include what is provided for with reference to the provisions as to the particular bond to be given in the case of sale of real estate either by virtue of the terms of the will or under a decree of court; yet it is a principle of construction that the special mention of one thing to be covered by a particular bond indicates that it was not intended to be covered by a general provision which would otherwise be applicable. As stated by Endlich on the Interpretation of Statutes (sec. 399): "Where there is in the same statute a particular enactment and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." This rule is cited approvingly in *Chicago and Northwestern Railway Co. v. City of Chicago*, 148 Ill. 141. The entire section relates to the same subject matter and has in view but one object, and the provision which requires that two bonds are to be taken in the case of a sale of land, either under authority of the will or an order of court, one of which is to secure the proceeds of the sale of real estate and the other to secure proper application of the personal estate, precludes the idea that one is to be taken in strict accordance with the statutory form, which would waive the necessity

of the other and render liable the securities on the first bond for any failure in the discharge of duties of a different character for which the second bond is expressly required to be taken.

It was held by this court in *Hall v. Irwin*, 2 Gilm. 176, that after the introduction of conveyance by will executors were frequently appointed by the testator to effect the conveyance, but were not necessarily and by virtue of their office the agents for such purpose; that, so far as they were charged with the alienation of lands, they acted by virtue of the power given in the will,—a common law power,—or as donees of the grant, and not as executors. The rule of the common law was, that executors, as such, have no estate in or power over the real estate of their testator; that their power to sell must be derived either from the will or by virtue of the statute. No statute is shown to exist save as provided for by the statute on administration, and the power of the executor under that statute is only to sell when it becomes necessary to pay debts or legacies, and it is not an executorial power to sell for investment. Where the will provides for a sale by the executor with power to re-invest, and for the sole purpose of re-investment, it is not the discharge of a duty as executor but the discharge of a duty as trustee. (*Gammon v. Gammon*, 153 Ill. 41; *White v. Ditson*, *supra*.) In this latter case it is said: "The power to sell real estate, independently of that which may be given by the probate court for the payment of debts and legacies, is a trust power different from that which belongs properly to the executor or administrator." That case involved a suit upon an executor's bond, which, among other conditions, secured "the proceeds of all his real estate that may be sold for the payment of debts and legacies, which shall come to the possession of said executor." The contention there was that the bond secured all the proceeds of the real estate sold by the executor. The court say on that point: "To construe it (the bond)



as binding the sureties to be responsible for a sale of real estate, made for no such purpose but by authority of a trust power given in the will, is to extend their obligation much too far. \* \* \* We understand that the argument by which this responsibility is deemed to exist is, that, the real estate having been lawfully turned into money under the power of the will, the proceeds became of 'the goods, chattels, rights and credits' of the estate, for the faithful administration of which the sureties were bound. If this argument were tenable, it would follow that, when real estate was ordered to be sold to a greater amount in value than was necessary for the payment of debts and legacies, which the probate court is authorized to do when land cannot be divided, the sureties on an administrator's bond in the form here used would be responsible for the surplus. Yet this is certainly not the case. An additional bond has always, in such case, been taken for the protection of this surplus, for the reason that the sureties in the original bond have been held not responsible for it, until the recent change in the administration bond.—*Bennett v. Overing*, 16 Gray, 267; *Robinson v. Millard*, *supra*."

There has been on this subject, it must be conceded, a conflict of authority in the decisions of the several States, not reconcilable by reason of the differences which exist in the form of the bonds considered in the several cases. They were all examined with great care in *Probate Court v. Hazzard*, 13 R. I. 3. It was there held that in a suit on an administrator's bond, conditioned to administer all the "goods, chattels, rights and credits" of the deceased, the sureties were not liable for the proceeds of real estate sold by the executor under a power in the will. The words "the proceeds of real estate sold for the payment of debts and legacies," are not found in the Rhode Island bond, but how strictly these have been limited in Massachusetts is shown by the cases already cited. Even if the real estate has been changed into money by virtue of

a power in the will, it is not, in our view, that personal property for the administration of which the sureties became responsible.

Counsel for plaintiff in error rely on *Wadsworth v. Connell*, 104 Ill. 369, as establishing the liability of the sureties for all money that may come to the hands of the executor, from whatsoever source they may be derived. The bond in that case was given under section 7 of the chapter on administration, as revised in 1872. The statute at that time provided that all executors should enter into bond, in good and sufficient security, in a sum in double the value of the estate. No distinction was made between the personal and real estate, nor did that statute contain a provision that a bond should be given in case of a sale of real estate under a will providing for such sale. That statute, however, was amended in 1881 and the law enacted as it now stands. That case is distinguishable from the one at bar, and what is said with reference to the liability of the executor in that case has no relation to the question here presented. Under the statute as it now stands, where a will makes the same person executor and trustee, the executor's bond cannot be construed for the faithful performance of the duties belonging to the trustee. A separate bond should be given by the trustee. *Hinds v. Hinds*, 85 Ind. 312; *Woerner's Law of Administration*, sec. 260.

Plaintiff in error contends that the sureties on the executor's bond are bound by his report as such executor, and are estopped from denying that he had a balance in his hands, as such executor, according and at the date of his report. The reports of the executor and the facts agreed upon show that he received from the sale of real estate and the rent on the real estate, and interest on the proceeds, the total sum of \$5399.82; that he received as the proceeds of the personal property \$3601.03; that he paid out an aggregate of \$5858.99. To the balance he adds the excess paid the widow over her award and in-

come from real estate, \$796.83, and reports a balance on hand as due from the executor \$3938.69. It becomes necessary to determine whether the amount thus reported is conclusive on the sureties on the bond, and whether that sum is the measure of their responsibility.

The record in this case shows that on March 13, 1889, the executor filed an inventory of the property of the value of \$8627.61, and on the 13th of March, 1889, he filed his first report, showing items of receipts aggregating \$2864.03, and that he had paid out \$2839.78. On February 23, 1892, he filed his second report, showing, with the balance on hand at his last report, receipts to the amount of \$5489.07, and that he had paid out since the filing of the last report the sum of \$1573.96. On January 24, 1894, he filed his third and last report, showing receipts, with the balance on hand from the former report, \$4587.11, and credits since the last report of \$1445.46. The two last reports included proceeds of the sale of the land, with the interest thereon. It is not shown that either of said reports was approved, or that the court found on the report that the amount in the hands of the executor was as stated by him.

A line of authorities may be found in this State which hold that a public officer who by the statute is required to keep books of account and correctly state the accounts therein, is, with his sureties, chargeable with the amount with which he charges himself on those books, and that he and his sureties are estopped from questioning or denying the correctness of the books showing the amount received or on hand. That line of cases is such as arise on the bond of the county treasurer or on the bond of a school treasurer, and like officers whose books are evidence against the officer of the amount received, which is not to be conclusively determined by any adjudication or finding of a court approving the same or adjudging that such officer is in possession of such sum. Of this

line of cases we cite *Cawley v. People*, 95 Ill. 249; *City of Chicago v. Gage*, id. 593; *Doll v. People*, 145 id. 253.

In *Robinson v. Millard*, *supra*, it was held: "Even if the allowance of a guardian's account conclusively settles that he is chargeable with the whole balance apparently due, it is not conclusive upon the question which class of sureties are responsible for his failure to do with the balance what is duly required of him. This must depend upon the source from which the money thus charged against him was derived. The fact, therefore, that the executors here saw fit to charge themselves in their general account with the balance remaining after the payment of debts, legacies and charges, does not conclude the sureties under the general bond. Where one may rightfully hold a sum of money or other property in either of two capacities, his own election may determine, even as against sureties, in which capacity he thus holds it; but such case is readily distinguishable from the present." To the same effect is *Lyman v. Conkey*, 1 Metc. 317, and *Mattoon v. Cowing*, 13 Gray, 387. In *Commonwealth v. Gilson*, 8 Watts, 214, it was held the sureties on an ordinary administration bond are not liable for the proceeds of the estate of the intestate, though charged in the account of administration by the executor in the orphans' court. In *Clay v. Hart*, 7 Dana, 1, it was held the sureties of an executor cannot be made liable for funds which the executor received as agent or trustee for a legatee, though he has charged himself with them in his executorial accounts.

Where a report is made by an administrator or executor, and there has been an adjudication by the court approving that report and ordering payment from the funds in the hands of such administrator, that judgment is evidence that is conclusive on such administrator or executor, as also upon his sureties, by the express provisions of section 115 of chapter 3 of the Revised Statutes. Upon failure to pay over in accordance with such order of the

court the executor or administrator is guilty of a *devastavit*, and suit may be instituted upon the bond of such officer. Such suit is on the bond and judgment itself, and such judgment, when offered in evidence, showing the approval by the court and order to pay over, is like any other judgment of a court of competent jurisdiction, that cannot be attacked in such collateral action except for fraud. *Ralston v. Wood*, 15 Ill. 159; *Housh v. People*, 66 id. 178; *Frank v. People*, 147 id. 105.

The approval of the report of the executor or administrator is a judicial act to be done by the court, and when made and entered is binding upon all parties before the court. (*Dickson v. Hitt*, 98 Ill. 300.) Until a court approves such report or a report of final settlement, the administration remains open for such further order and proceeding as may be necessary to finally settle and distribute the estate, and the court may change the report and add to or deduct from the liability of such executor or administrator, as shown by the report; but until its approval by the adjudication of the court having jurisdiction thereof, the mere report itself is not conclusive upon the parties, but is open for inquiry. *Frank v. People*, *supra*.

Where the report of an officer, such as an executor or guardian, is presented to the county court for approval, all questions relating to the claim within the jurisdiction of the court and necessarily involved in the inquiry before the court must be regarded as finally and conclusively settled by the adjudication in that proceeding. It is well settled, however, that judgments or orders of that character are not to be extended, by mere intendment, to matters not necessarily involved in the determination. (*Jessup v. Jessup*, 102 Ill. 480.) In the adjustments of the accounts of guardians, executors and administrators the county court is possessed of equitable powers, and exercises, to a certain extent, equitable jurisdiction. (*Bond v. Lockwood*, 33 Ill. 212; *In re Steele*, 65 id. 322.) Until a final

settlement, if it appear there be omissions or mistakes in the reports theretofore made, that court may correct such mistakes, as may also be done by any court to which an appeal may be taken. (*Bruce v. Doolittle*, 81 Ill. 103; *Bennett v. Hanifin*, 87 id. 31.) The report of the executor thus presented, upon which there has been no adjudication by the county court, cannot be held conclusive on the sureties in this case.

It is insisted by the plaintiff in error that the lands directed to be sold by the provisions of the will were situated in the State of Iowa, and hence the provisions of our statute do not apply and have relation only to lands in the State of Illinois. This would incorporate into the statute, which requires a general bond of the executor, a provision which would create a liability on the general bond of the executor in the case of a sale of lands lying outside of the State, not authorized by its terms, and would except from another part of the same section a requirement with reference to the sale of lands which requires a bond to be given as a separate and independent bond to secure the proper application of money derived from the sale of lands. Neither the exception nor the incorporation of a liability is authorized by the terms of the statute, and we hold; therefore, that the bond required to be given to secure the proceeds of the sale of land by an executor, which is authorized to be sold by the terms of the will or by the decree of court, must be given as a separate and independent bond to secure such fund, regardless of the fact whether the land lies within or outside of the State of Illinois.

The question is presented by the briefs of counsel whether a sale of real estate under the provisions of a will or under a decree of court, without first giving a bond as provided by the last clause of section 7, would be null and void. On this question there is conflict of authority, but under the facts appearing in this record it is not necessary to determine that question.

It appears from the evidence in the record that the sum of \$1498.04 was expended in the purchase of real estate in Colfax, Illinois, and the correctness of that expenditure does not appear to have been questioned in either the county, circuit or Appellate Court. But at the time of its expenditure the payment for that real estate was largely made from funds in the hands of the executor as proceeds from the personal estate. There is no finding in the judgment of the Appellate Court. The facts are stipulated and there is no dispute as to the same. The question presented on the record is whether such facts constitute a defense. By this stipulation of facts this court will pass upon them, and determine from them, as a matter of law, what is shown thereby. (*Launtz v. People*, 113 Ill. 137; *Sweetser v. Matson*, 153 id. 568.) The Appellate Court having remanded the cause with specific directions upon a record containing stipulated facts merely, its finding and judgment are not conclusive on this court, and this court will examine the stipulation to see whether there was a proper application of rules of law that warranted the judgment. *Chicago and Alton Railroad Co. v. Pennell*, 110 Ill. 435; *Hogan v. City of Chicago*, 168 id. 551.

From the entire facts in the record we hold that there was no liability under this bond, and hence the court erred in refusing the propositions asked by the defendants in error and in holding those which were held of its own motion.

The judgment of the Appellate Court for the Third District and the judgment of the circuit court of McLean county are each reversed and the cause remanded.

*Reversed and remanded.*

CARTWRIGHT, C. J., and WILKIN and BOGGS, JJ., dissenting.

TONA BONARDO *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1899—Rehearing denied December 13, 1899.*

1. **CRIMINAL LAW**—*what will show which of several persons inflicted wound.* The evidence shows that a certain one of several persons who made an attack upon the deceased inflicted the fatal knife wound, when such person was the only one of the assailants shown to have been armed with a knife capable of making the wound.

2. **SAME**—*what evidence justifies verdict of manslaughter.* A verdict of manslaughter is justified by evidence that the accused participated in a deadly assault upon the deceased, and while striking the latter urged the others to "kill him."

3. **SAME**—*it is for the jury to deduce the truth from contradictory testimony.* In a murder trial, where the testimony of accused contradicts that of other witnesses, it is for the jury to determine where the truth lies.

4. **SAME**—*when question of malice or irresistible passion is for the jury.* It is for the jury to say whether, under the circumstances, a homicide was the result of an irresistible and violent impulse of passion, or whether the conduct of the accused was the result of malice and intent to commit murder, where he pursued and stabbed the deceased after the latter struck him and ran away.

5. **SAME**—*what is not such provocation as reduces homicide from murder to manslaughter.* The mere firing of a pistol in the neighborhood does not amount to that considerable provocation which the law recognizes as necessary to reduce the consequent killing of the party by the accused from murder to manslaughter.

6. **SAME**—*when homicide cannot be justified on ground of self-defense.* One who pursues and mortally stabs with a knife a person who struck him and then ran away cannot justify the homicide on the ground of self-defense.

7. **NEW TRIAL**—*affidavit that verdict was arrived at by chance must show source of affiant's belief.* An affidavit made by one convicted of crime, in support of his motion for a new trial, that the verdict in his case was arrived at by chance, although directly averred must be presumed to have been made upon information and belief, and therefore insufficient, when the source of the affiant's information is not shown.

8. **TRIAL**—*when remarks made by the State's attorney are not prejudicial.* Remarks made by the State's attorney in his closing address to the jury are not prejudicial, when, after objection to them was sustained by the court, the State's attorney withdrew them and

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told the jury not to consider them, and the court instructed the jury to disregard statements not based on evidence.

9. *SAME—reading defendant's instructions between parts of People's is not reversible error.* That the judge read the instructions for the accused after reading part of the instructions for the People, and then gave the remainder of the People's instructions, although not good practice is not reversible error, where the instructions of the accused were read consecutively and without interruption.

10. *SAME—when accused cannot complain that he was not present at argument for new trial.* One convicted of murder cannot complain that he was not present during the argument for a new trial, made before the judge in chambers, when his absence was consented to by his counsel, and he was present later, when the motion was passed upon.

11. *APPEALS AND ERRORS—verdict will not be lightly disturbed upon the facts.* In absence of error of law a verdict in a criminal case will not be set aside, when evidently the result of a dispassionate consideration of all the evidence, by which it is manifestly authorized.

12. *VARIANCE—what is not a variance between allegation and proof—names.* There is not a variance between an indictment charging the defendant with the murder of John Young, Jr., and the proof, where most of the witnesses speak of the person killed as "Johnnie Young," as the court will take judicial notice that "Johnnie" is a nickname for "John," and the word "Junior" or "Jr." is a matter of description and not part of the name.

WRIT OF ERROR to the Circuit Court of Williamson county; the Hon. A. K. VICKERS, Judge, presiding.

This is an indictment against plaintiffs in error for the murder of one John Young, Jr., on the 16th day of October, 1897. The indictment was found by the grand jury of Williamson county at the May term, 1898, of the circuit court of that county, and the trial was had at the September term, 1898, of said court. The jury found plaintiff in error, Tona Bonardo, guilty of murder, as charged in the indictment, and fixed his punishment at imprisonment in the penitentiary for twenty-five years; and found the plaintiff in error, George Colombo, guilty of manslaughter, and fixed his punishment at imprisonment in the penitentiary for two years. A motion for a new trial was made and overruled. Motion in arrest of judgment was also made and overruled. Judgment and

sentence were then pronounced in accordance with the verdict of the jury. The present writ of error is sued out for the purpose of reviewing said judgment.

Plaintiffs in error were coal miners; and, for some time prior to the killing of the deceased, were working in what are known as the "Brush mines," near Carterville in Williamson county. The coal company, for which they worked, had built houses for its employes near the coal shaft, and the name, given to the group of houses so built and occupied, is Greenville. Between the rows of houses, running east and west, is a public street sixty or seventy feet wide. On the evening of October 16, 1897, between eight and nine o'clock, plaintiffs in error were in one of the houses, called in the record "house No. 2," in company with quite a number of other persons, who, during the early part of the evening, had been drinking beer, and later in the evening were eating lunch. Outside and in the street were four or five persons, to-wit: the deceased, John Young, Jr., an Italian named Charlie Calcatarie, and one John Ward, Sr., and his son, John Ward, Jr. With them also was a man named Walter Jacobs, who lived in house No. 22. The night was a starlight night. While plaintiffs in error were in house No. 2, and while these parties were in the street, either opposite or very near to house No. 2, a pistol shot was fired. The evidence tends to show that more than one shot was fired, but whether two or three shots were fired, is left somewhat uncertain by the testimony. According to the testimony of a number of witnesses, the shots were fired considerably to the east of the place where these parties were standing in the street, and in or near what is spoken of as the main road, running north and south. After the firing of the second shot, plaintiff in error, George Colombo, came out of house No. 2 into the street, and asked who fired the shot. Calcatarie, who is said by some of the witnesses to have been intoxicated, replied to Colombo that he did not know who fired the pistol, and told

him, if he wanted to know who fired it, to go and find out. Colombo continued asking who fired the pistol, and John Ward, Sr., told him, that some one out in the road east of them fired it.

In a few moments, plaintiff in error, Tona Bonardo, came out of house No. 2, and entered into conversation with Calcatarie, and asked, as did Colombo, who fired the pistol. There is some testimony to the effect that the deceased, John Young, Jr., who was standing there in the street, replied to Bonardo that he had fired the pistol. The deceased had been drinking that evening, and was evidently under the influence of liquor. Some of the witnesses deny, that the deceased said that he had fired the pistol, and others state that he did say so. The evidence, however, does not show that any pistol was found in his possession. The impression, made upon the mind by the testimony, is that the pistol was not fired by the deceased.

When Tona Bonardo came out of the house, he and George Colombo rushed towards the deceased, after they had made their inquiries in regard to the shooting of the pistol, and struck and pushed him in his breast and on his side with their hands. They were subsequently joined in their onslaught upon the deceased by two other persons, who were subsequently indicted, but who escaped arrest. While plaintiffs in error were making this onset upon the deceased, the deceased took a bottle out of his pocket, and struck plaintiff in error, Tona Bonardo, in the face, or on the forehead, breaking the bottle and cutting Bonardo's face, so that it bled. After the deceased had thus struck Bonardo with the bottle, he ran away some forty-five feet. Plaintiffs in error, joined by the two persons already referred to, ran after the deceased, and renewed the attack upon him; they struck him, and knocked him down. While he was sitting upon the ground, he called out, and said: "Don't let them hit me any more." One of the Wards said: "For God's sake, don't

let them hit him any more." John Ward, Jr., went forward, and picked up the deceased in his arms, and tried to carry him off, but plaintiffs in error pulled him away from Ward, and renewed the attack upon him. After he was prostrate upon the ground, these parties continued to strike and kick him. Some movement on the part of the attacking party seems to have been made towards making an attack upon John Ward, Sr. Thereupon, the Wards left the place where the fight occurred, but one of them returned in about thirty minutes, and found the deceased nearly dead. He was mortally stabbed, and a wound, about an inch and a quarter long, the result of the stab, was found in the left side of his body. The plaintiffs in error are shown by the evidence to have kicked and beaten the deceased, and, while doing so, one of them kept crying out, "Kill him, kill him." The testimony shows, that he was beaten into insensibility, and left prostrate on the ground, where he died in about an hour.

SMITH & HENSHAW, J. L. GALLIMORE, and WILLIAM A. SCHWARTZ, for plaintiffs in error.

EDWARD C. AKIN, Attorney General, (R. R. FOWLER, State's Attorney, and ED. M. SPILLER, of counsel,) for the People.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—It is claimed by plaintiffs in error that the facts do not justify the verdict. The evidence was such as to warrant the jury in finding that plaintiff in error, Tona Bonardo, stabbed the deceased, and inflicted the wound, which caused his death. Before Bonardo left the house, and when the pistol shot was heard, he was sitting at a table with a butcher's knife in his hand, cutting cheese and bread to be distributed to those, who were there eating with him. When he left the house, he had the butcher's knife in his hand. When he returned to the house,

after making the assault in question, he still had the butcher's knife in his hand, and there was blood upon it. It is true that his face was bleeding from the blow inflicted upon him by the deceased with the bottle, and the witness, who speaks of seeing blood on the knife, says that he could not say whose blood it was. But Bonardo made an attack upon the deceased, and he is the only person, shown to have had a weapon capable of inflicting the stab, which caused the death of the deceased.

Bonardo fled, and was arrested by the officers a mile and a half from the place of the killing, three days after it took place, in a yard, or field, where the weeds were high enough to conceal him. The proof shows, that it was difficult for the officers to find him on account of the weeds, in which he had concealed himself. He did not admit in so many words that he had stabbed the deceased, but, when asked by one of the officers, and also afterwards by the jailer, why he had stabbed the deceased, he replied, "Because he hit me with a bottle."

The plaintiff in error, Colombo, is shown by the evidence to have been engaged in the assault, made upon the deceased, and to have participated in the blows inflicted upon him. The testimony also shows, that Colombo cried out during the assault: "Kill him, kill him." When Colombo, who, as well as Bonardo, was an Italian, was asked to desist from striking the deceased, he said: "No God damned American can come here and shoot pistols." The proof also shows that, about a year prior to October 16, 1897, a difficulty had occurred between Colombo and the deceased, and threats were then made by Colombo against the deceased. We are of the opinion, that the verdict of the jury, so far as it applies to plaintiff in error, Colombo, was warranted by the evidence.

Plaintiff in error, Colombo, testified in his own behalf, and contradicted much of the testimony given by the other witnesses as to his participation in the killing of the deceased, and as to his utterances and conduct at

that time. But it was for the jury to determine, as between the contradicting witnesses, where the truth lay. In *Gainey v. People*, 97 Ill. 270, we said (p. 275): "In capital cases, like the present, the accused, if guilty, has the most powerful and urgent of motives to misrepresent the real facts, and if this court is bound in every case of the kind to set aside the conviction merely because the testimony of the accused shows a case of justifiable homicide, it would not be long until there would be no security for life or limb, and trials by jury would become idle and useless ceremonies."

Verdicts of juries will not be interfered with by the courts, when they are manifestly authorized by the evidence. There is nothing here to show, that the verdict was not the result of a dispassionate consideration of all the evidence in the case; and, this being so, it is not the duty of a court of review to set aside the conviction, unless it is shown that there is material and substantial error in the record. It is peculiarly the office of the jury in criminal cases to pass upon the guilt or innocence of the prisoner; and, therefore, it is not our duty as a court to set aside the verdict of the jury in such a case, even though we may, on the written evidence of the record before us, entertain doubts of the correctness of the finding of the jury. "What circumstances amount to proof of an offense can never be a matter of general definition. The test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury." (*Raggio v. People*, 135 Ill. 533; *Cronk v. People*, 131 id. 56; *Carlton v. People*, 150 id. 181).

It is contended on behalf of the plaintiff in error, Tona Bonardo, that the offense proved against him cannot be regarded as murder, but was merely manslaughter, or justifiable homicide. We can see nothing in the mere fact of the firing of the pistol, which justified the assault made by Bonardo upon the deceased. It is not shown by the evidence that the deceased fired the pistol at all.

Nor is there any proof, tending to show that the pistol was fired at either of the plaintiffs in error, or at the house where they happened to be at the time of the firing. As we understand the evidence, Tona Bonardo did not live in house No. 2, but was merely there for a temporary purpose. The deceased was only twenty years of age, and was slightly intoxicated on the evening when he was killed, and, if he fired the pistol, it does not appear that he so fired it with any evil intent; but the evidence shows that it was fired in the main road some distance to the east of house No. 2 and of the spot where deceased was standing. Words or gestures, however provoking or insulting, cannot amount to that considerable provocation which the law recognizes as necessary to reduce the killing from murder to manslaughter. (*Crosby v. People*, 137 Ill. 325). The mere firing of the pistol at a distance, even though it might be a provoking or insulting circumstance, could not be regarded otherwise than as belonging to the same category with such words or gestures, as are referred to in the books.

It is claimed, however, that the assault by Bonardo upon the deceased should be regarded as having been made in self-defense, because he had been struck by the deceased with a bottle. After Bonardo received the blow inflicted with the bottle, the deceased ran some forty-five feet, but Bonardo pursued him, renewing the attack, and stabbed him with a knife. This pursuit and renewal of the attack were not necessary to the defense of himself from further injury. Where a defendant is assaulted by the deceased in such a way as to induce a reasonable and well-grounded belief that he is in actual danger of losing his life, or suffering great bodily harm, he will, while under such reasonable apprehension, be justified in defending himself, whether the danger is real or only apparent. (*Roach v. People*, 77 Ill. 25). In *Kota v. People*, 136 Ill. 655, we said: "While actual danger is not necessary to justify a resort to self-defense, yet the circumstances

must be such, as to induce a reasonable and well-grounded belief of danger of actual loss of life, or great bodily harm." (*Davison v. People*, 90 Ill. 221; *Steinmeyer v. People*, 95 id. 383). In the case at bar, the court instructed the jury, at the request of the plaintiffs in error, that, if a person is unlawfully assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life or sustaining great bodily harm, he will be justified in defending himself, even though the danger be not real, but only apparent. This instruction thus given was more favorable to the plaintiffs in error, than the instructions in regard to self-defense approved of by this court in the authorities above referred to. The question, therefore, as to whether defendant was justified in his attack upon the deceased upon the ground of self-defense, was fairly submitted to the jury, and plaintiff in error, Bonardo, cannot complain.

Before a homicide can be denominated manslaughter, the killing must be the result of that sudden and violent impulse of passion which is supposed to be irresistible. (*Nowacryk v. People*, 139 Ill. 336). The intent to commit murder is an essential element to show the existence of that crime, and such intent, like any other fact necessary to constitute crime, must be proved beyond all reasonable doubt. It is not necessary, however, that the party charged should have brooded over the intent, or entertained it for a considerable time. It is sufficient, if he intended to kill the party assaulted at the time when he made the assault. (*Weaver v. People*, 132 Ill. 536). In *Peri v. People*, 65 Ill. 17, we said: "To constitute malice, it is not necessary that the party should brood over and meditate upon the performance of the act for a considerable space of time; but it is sufficient, if it were deliberate and intentional, without apparently well-founded danger of great bodily harm, or where there is not such provocation as in law reduces the homicide to manslaughter." Malice is always implied where one person deliberately



injures another; and if a person uses a deadly weapon on another, resulting in his death, it must be inferred that the killing was malicious. (*Davison v. People, supra*). Bonardo was the aggressor in the first conflict, and he did not cease to be such until the deceased was disabled. It was for the jury to say whether, after he was struck by the deceased with a bottle, the killing was the result of such a sudden and violent impulse of passion as was irresistible; and it was for the jury to say whether, under all the circumstances, his conduct was the result of malice and intent to commit murder. They had a right to consider the fact, that he renewed his attack upon the deceased after the latter had run away, in determining whether, under all the circumstances, such renewal of the attack was necessary for his own defense, or was the result of a sudden and violent impulse, supposed to be irresistible.

*Second*—Plaintiffs in error complain of certain remarks made by the prosecuting attorney in his closing address to the jury. The record shows, that counsel for the plaintiffs in error objected to the remarks made, and that the objection was sustained by the court, and that the State's attorney thereupon withdrew the remarks and told the jury not to consider the same. In addition to this, the court, at the request of the plaintiffs in error, instructed the jury, that they should disregard any statements made by the prosecuting attorney, which were not based upon the evidence, if any such statements were made, as being wholly improper; and should not in any manner consider such statements in arriving at their verdict. It is apparent, therefore, that no injury was done the plaintiffs in error by the remarks in question. The court of review will always hesitate to set aside a conviction on account of remarks by the State's attorney, unless it appears that the jury were carried away by passion or prejudice in the rendition of their verdict. (*Raggio v. People, supra*). Nothing of the kind appears here.

*Third*—Plaintiffs in error make the objection, that the argument upon the motion for a new trial was made before the judge, before whom the case was tried, in his chambers in Golconda in Pope county, and that plaintiffs in error were not present during the argument. It clearly appears from the record, that this was agreed to by the counsel for the plaintiffs in error. The record also shows that, when the presiding judge returned to the circuit court of Williamson county, he passed upon the motion for new trial in the presence of plaintiffs in error, and their counsel.

*Fourth*—It is objected by plaintiffs in error that, before the court read the instructions to the jury, he fastened them together in one bunch, placing a part of the People's instructions first, and then all of the instructions of the defendants, and then, lastly, the remainder of the People's instructions. This court has held in a number of cases that the charge to the jury, consisting of all the instructions requested by both sides, is one charge. Counsel for plaintiffs in error say, that the plaintiffs in error were thereby deprived of the privilege of having the theory of their defense properly submitted to the jury. It is not apparent, that any such result was the consequence of this procedure. The instructions, asked by plaintiffs in error and given for them, were read consecutively, and their theory was fully presented to the jury without interruption or interpolation.

*Fifth*—It is furthermore charged by the plaintiffs in error, that the verdict in this case as to the plaintiff in error, George Colombo, was arrived at by chance. It is said, that the jury agreed to decide the fate of Colombo by a majority vote, which resulted in seven jurymen voting for a sentence of two years and five against the same; and that the verdict was thereupon rendered in accordance with such previous agreement entered into by the jury before the vote was taken. The only way, in which such matter was brought to the attention of the court

below, was by an affidavit, made by Colombo himself in support of the motion for a new trial. This court has held, that an affidavit setting up that the verdict of a jury was the result of chance, must not be upon the belief and information of the affiant. (*City of Pekin v. Winkel*, 77 Ill. 56). It is true that, here, the affidavit made by the plaintiff in error, Colombo, does not recite specifically that the affiant makes the statements therein made upon information and belief. But it is difficult to understand how they could have been made otherwise than upon information and belief. Plaintiff in error cannot, by stating a fact in an affidavit, set aside the verdict of a jury, when all the presumptions and circumstances of the case are against his having any knowledge on the subject, except so far as he derived information from others. It has been held by this court, that affidavits of jurymen will not be received to impeach their verdict, and that affidavits as to statements made by jurymen will not be received to impeach their verdict. (*Palmer v. People*, 138 Ill. 356; *Sanitary District v. Cullerton*, 147 id. 385). Plaintiff in error, Colombo, does not state how he derived his information upon this subject. If his affidavit had set up that the statements in regard to the rendition of a chance verdict were made to him by any of the jurymen, such affidavit could not be received. The statute provides that, when the jury retire to consider of their verdict in any criminal case, they shall be attended by a sworn officer. But it is improper for an officer of the court, or any one else not a jurymen, to be present, when the jury are deliberating upon the subject of their verdict. Such a breach of duty on the part of an officer is a great irregularity. (*Gainey v. People*, *supra*). It will be presumed, that the officer in charge of the jury did his duty, and was not guilty of the breach of duty here referred to. (*Pate v. People*, 3 Gilm. 644). The law will presume, that Colombo was not present in the jury room while the jury were deliberating on his case. The law will also presume,

that the officer in charge of the jury did his sworn duty, and did not permit plaintiffs in error to hear or know anything of the deliberations of the jury. The burden is on plaintiffs in error to show, that the acts of the jury were illegal. The proceedings below will be presumed to be regular and free from error, until error is shown from the record. Every reasonable intendment, not negatived by the record, is to be indulged in support of the judgment below. (*Mullen v. People*, 138 Ill. 606; *Kelly v. City of Chicago*, 148 id. 90; *Chicago, Peoria and St. Louis Railway Co. v. Aldrich*, 134 id. 9; *Fairbanks v. Farwell*, 141 id. 354). In view of the presumptions and intendments above referred to, the statement made by the plaintiff in error could not have been made otherwise than upon information and belief; and, therefore, the court below committed no error in refusing to grant a new trial because of the statement so made in the affidavit.

*Sixth*—The further objection is made, that the indictment charges the plaintiffs in error with the murder of John Young, Jr., and that the testimony shows the murder of one "Johnnie Young;" and that, therefore, there is a variance between the indictment and the proof, which is fatal. Undoubtedly, the party killed must be proved to be the same person named in the indictment. (*Davis v. People*, 19 Ill. 74; *Shepherd v. People*, 72 id. 480; *Penrod v. People*, 89 id. 150).

The proof shows clearly that, although most of the witnesses speak of the party killed as "Johnnie Young," Johnnie Young was the same person as "John Young, Jr.," named in the indictment. Counsel, in questioning witnesses, and witnesses, in testifying, speak of John Young, as well as Johnnie Young. Counsel for plaintiffs in error begin instruction 29, which was asked by them and given in their behalf, in the following words: "Though the jury may believe from the evidence that said John Young, Jr., lost his life at the time and place in question," etc. The counsel for the prisoners, in the instructions asked by

them, thus refer to the person killed as John Young, Jr. This circumstance is mentioned in *Shepherd v. People, supra*, as a circumstance going to establish the identity of the person killed with the person named in the indictment.

The evidence does not show, that there was any other person known as John Young, Jr., in the neighborhood where the killing occurred, or connected with the events which transpired on the evening of the killing, than the Johnnie Young, or John Young referred to by the witnesses. Moreover, the abbreviations of a man's name are so common, that, without any violence to the law of the land, courts take judicial notice of them. (*Fenton v. Perkins*, 3 Mo. 144; 15 Am. & Eng. Ency. of Law, p. 115). Thus, "Jo" has been held to be equivalent to Joseph, and "Jack" has been held to be equivalent to John. (16 Am. & Eng. Ency. of Law, p. 115, note 4). Therefore, the court will take judicial notice that "Johnnie" is but another name for John. Again, the word "Junior" or "Jr." is merely a matter of description, and is no part of a person's legal name. "To improperly add or omit them is harmless error, whether in civil or criminal proceedings." (16 Am. & Eng. Ency. of Law, p. 121). In *Headley v. Shaw*, 39 Ill. 354, the declaration alleged that a note was made by the defendant by the name of Samuel Headley, whereas the note offered in evidence was signed "Samuel J. Headley, Jr.;" and we there said: "The weight of authority seems to be that this is no variance. Jr. added to a person's name is no part of the name."

We are, therefore, of the opinion that the evidence shows the identity of the person killed with the person named in the indictment.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.*

v.

ALONZO R. HILL.

182	425
195	623

*Opinion filed October 19, 1899—Rehearing denied December 13, 1899.*

1. PLEADING—*answer to petition to disbar attorney should explain the transactions fully.* An answer to an information for disbarment filed against an attorney, charging him with malconduct and violation of duty, should not merely deny the charges made, but should explain and set out the *bona fide* character of the transactions to which they relate.

2. ATTORNEYS AT LAW—*fraudulently inducing court to take jurisdiction of divorce cases is ground for disbarment.* It is a sufficient ground for disbarment that an attorney, by virtue of false evidence, fraudulently induced the court to take jurisdiction of suits for divorce and enter decrees in them.

3. SAME—*circuit court's judgment convicting attorney of malconduct is res judicata in subsequent disbarment proceeding.* A judgment of conviction entered on a plea of guilty to an information against an attorney in the circuit court, charging him with malconduct, is conclusive in a subsequent disbarment proceeding.

4. SAME—*when judgment convicting attorney of malconduct will not be vacated.* A judgment of conviction rendered by consent, by way of compromise, to prevent the trial of other charges against an attorney charged by information with violation of duty, will not be vacated, in the absence of fraud, on the ground that the attorney acted on the erroneous advice of counsel.

ORIGINAL information for disbarment.

This is an information, filed in this court by the Attorney General of the State on behalf of thirty-nine members of the bar of Vermilion county, alleging that the defendant is a licensed attorney, and has been guilty of malconduct as such in bringing and prosecuting suits for divorce, in which fraud was practiced on the court, of which the defendant had notice. The information further alleges, that the acts, therein set up and hereinafter referred to, are in violation of his duty as an attorney, and contrary to the statute, and against the dignity and peace of the People of the State. The prayer of the informa-

tion is, that the name of the defendant, Alonzo R. Hill, be stricken from the roll of attorneys of this court.

A sworn answer was filed by the defendant to the information. To this a replication was filed, and issue was joined. The case was referred to a commissioner to report to the court the evidence of the respective parties. The evidence has been taken, and reported in compliance with the order; and the case has been argued by the parties, and is submitted for decision.

The information makes the following charges against the defendant:

"1. That in the circuit court of said Vermilion county, at its January term, A. D. 1898, in a certain divorce proceeding there pending, entitled No. 6281, *Little v. Little*, he falsely and fraudulently represented to the judge of said court that jurisdiction had been obtained over the defendant in said cause by the service of summons duly had and returned, whereas, in truth and in fact, there was no summons returned and the court was without jurisdiction; and also that the said defendant in said cause was then and there an insane person and confined in the asylum at Kankakee, as the said Hill then and there well knew, which fact he concealed from the court, and by reason of the premises the court heard evidence and was asked to enter a decree, but discovering the fraud refused to do so.

"2. That in another divorce case in the same court, at its May term, A. D. 1898, entitled No. 6361, *Christian Roos v. Dora Roos*, there was filed a false affidavit of non-residence of the defendant in the cause, alleging said Dora Roos to be a non-resident of the State of Illinois, whereas, in truth and in fact, she resided in Chicago, in this State, as said Hill then and there well knew; and further, that in said case, as a cause of divorce, it was alleged that the defendant abandoned the complainant, whereas, in truth and in fact, the complainant had abandoned the defendant and was then under indictment for wife aban-

donment found by the grand jury of Cook county, and by means of false and perjured evidence procured a decree of divorce to be therein entered in favor of the complainant, which decree was afterwards vacated at the same term on account of the fraud practiced on the court, of all of which said matters and of the falsity thereof said Hill had knowledge, and acted as attorney for the complainant; which acts were unprofessional, dishonorable and scandalous, and calculated to bring the courts of justice into disrepute and contempt and tarnish the good name of the profession, and contrary to his duty as an attorney and counselor at law."

The information filed here further alleges, that an information was filed in the circuit court of Vermilion county, charging the defendant with numerous acts of unprofessional conduct, and particularly with the same acts above set forth; that he was summoned into the circuit court, filed an answer denying all the charges, and, afterwards, being in court in person and by his attorneys, withdrew his answer, and pleaded guilty to the charges above specified on May 29, 1898, of the May term of said circuit court.

The answer of the defendant to the information here admits, that he is an attorney, and that an information was filed against him in the circuit court of Vermilion county to the effect above set forth; that he answered the same; and that he did plead guilty to the allegations in the said information, which are: "That he did impose upon the officers of the said circuit court by bringing and prosecuting actions for divorces, in which frauds were practiced upon the court to obtain the same, of which frauds he then and there had notice," and particularly that "he was guilty of the offenses charged against him in the paragraphs, numbered 1 and 2, of the information, as above set forth."

In his answer the defendant says, that, if he was guilty of any such offenses, they were committed in Vermilion



county; that, in the proceedings there, the circuit court adjudged that he was guilty, "and that the State's attorney entered a *nolle* to all charges, and the defendant was therein sentenced to a suspension of all his rights as an attorney and counselor at law in the county of Vermilion for the term of two years, and to pay costs." The answer further alleges, that the "defendant was induced to plead guilty to said charges by assurances from the State's attorney, that the matter against him would not be further prosecuted; that he was anxious to rid himself of further trouble; that he had a large and profitable business in Vermilion county and adjoining counties; that he would not have pleaded guilty to the said charges, if he had not been assured, and believed, that he would not suffer further prosecution."

E. C. AKIN, Attorney General, and S. G. Wilson, State's Attorney, (F. LINDLEY, I. A. LOVE, and G. F. REARICK, of counsel,) for the relators.

SALMANS & DRAPER, for the respondent.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The offenses charged against the defendant relate to two divorce suits, brought by him in the circuit court of Vermilion county, entitled *Hannah A. Little v. Flavius N. Little*, and *Christian Roos v. Dora Roos*. It is charged in the *Little case*, that the defendant falsely represented to the court, that there was personal service of the summons therein, and that there had been a return by the sheriff of said summons; and, also, that the defendant, Hill, concealed from the court the fact that Flavius N. Little was insane; and that, by reason of these representations, he sought to induce the court to enter a decree of divorce, which, however, the court, upon discovering the fraud, refused to do.

It is charged that, in the *Roos case*, the defendant, Hill, induced the circuit court to take jurisdiction by virtue of false evidence as to the residence of Dora Roos, defendant therein, Hill knowing that the evidence was false; and by falsely alleging desertion by the defendant as a cause of divorce, when he knew that there had been no such desertion. The decree of divorce in the *Roos case* was entered, but was afterwards set aside by the circuit court upon discovery of the fraud.

If the defendant, Hill, was guilty of the conduct thus charged against him in these divorce cases, there is ground for his disbarment. (*People ex rel. v. Beattie*, 137 Ill. 553). It is to be observed, that the answer of the defendant does not deny the truth of the charges made against him in the information in the circuit court, so far as the divorce cases are concerned; nor does he explain and set out the *bona fide* character of the transactions to which the charges relate. "In answering the charges, preferred by the accusation or information and the accompanying affidavits, particularity should be observed, not merely to deny the charges, but to explain and set out the *bona fides* of the transactions to which they relate." (6 Ency. of Pl. & Pr. 715).

The record of the proceedings in the information, brought against the defendant in the circuit court of Vermilion county, shows that he pleaded guilty to these charges of misconduct in the divorce cases, and consented to the entry of an order suspending him from practicing in that court for a period of two years. The defendant's plea of guilty in the proceedings brought against him, and the judgment of conviction entered upon that plea, certainly constitute an admission of his guilt. In his sworn answer to the information in this court, he admits that he pleaded guilty and consented to the judgment of conviction, but says that he did so because of the assurance of the State's attorney, that he would not be further prosecuted. In his testimony, however, given be-

fore the commissioner, appointed by this court to take testimony in this case, he states, that he did not authorize his attorney to plead guilty for him; and that such plea of guilty was not authorized by him. In other words, his defense in his answer is an admission of pleading guilty, but with promise of no further prosecution; but his defense, as made when testifying, is, that the plea of guilty was entered without his authority or consent. "Where, in compromise of a claim, judgment has been rendered against the defendant with his consent, he can not, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel." (11 Ency. of Pl. & Pr. 1030, note 5).

The question at issue between the People and the present defendant in the proceedings by information in the circuit court of Vermilion county was, whether or not the defendant was guilty of the charges there made against him; and, inasmuch as that question was there adjudicated, the judgment is conclusive in this proceeding, which is also a proceeding by the People upon the relation of the Attorney General against the defendant. When a question at issue between two parties is once adjudicated in a former proceeding in a court of competent jurisdiction, the judgment, so adjudicating it, is conclusive whenever the same fact is again put in issue between the same parties. (*Hanna v. Read*, 102 Ill. 596; *Wright v. Griffey*, 147 id. 496; *Louisville, New Albany and Chicago Railway Co. v. Carson*, 169 id. 247; *Markley v. People*, 171 id. 260).

There is, however, evidence outside of the record of the proceeding by information in the circuit court of Vermilion county, and the judgment of conviction rendered therein, which establishes the truth of the charges made against the defendant.

The testimony shows, that the defendant drew an affidavit in the *Roos case*, alleging that Dora Roos was a non-resident of the State of Illinois, and procured publication to be made against her as such non-resident, when

he knew that the affidavit was not true. Christian Roos testifies in this case, that, when he applied for a divorce from his wife in 1898, she resided on Milwaukee avenue in the city of Chicago in the State of Illinois; and that he told the defendant, Hill, of his wife's residence in Chicago. Several witnesses also testify to the fact, that the defendant, in the *Little case*, represented to the court, that the summons therein had been served, when such was not the fact. The defendant himself, in his testimony, denies what these other witnesses thus say, but he is impeached by forty reputable citizens, business and professional men, living in Vermilion county. These witnesses all swear, that the reputation of the defendant for truth and veracity in Danville where he lives is bad, and that they would not believe him under oath. He does not produce a single witness to state that his reputation for truth and veracity is good.

The statement of the defendant, that he was promised immunity from further prosecution for his non-professional conduct if he should plead guilty to the charges against him of misconduct in the divorce cases, is denied by the State's attorney, and two members of the bar, who were instrumental in procuring the judgment of conviction in the circuit court of Vermilion county, by which he was suspended from practicing his profession in that county for two years. They swear, that he pleaded guilty and consented to the judgment upon condition that the case, then pending against him, should not be further prosecuted, but without any promise in reference to further proceedings, or to proceedings in the Supreme Court of the State, or elsewhere. It appears that the information in the circuit court of Vermilion county not only charged the defendant with malconduct in regard to the divorce cases, but also charged him with a number of other offenses, to-wit, with the slander of officers of the courts of Vermilion county, and that he had been convicted thereof; also, that his reputation for truth and

veracity was bad, and had been impeached, and that such impeachment had been made from time to time for the past fifteen years, and twice during the then term of court; also, that, in the past fifteen years, he had been indicted, or prosecuted, fifteen times for different offenses against the criminal law of the State; also, that he was indicted in the year 1891 on the charge of burning public records, and found guilty thereof by a jury, though, on a second trial, he was found not guilty; and, also, that he had been repeatedly arrested and imprisoned by the police, but had been released on account of corrupt testimony furnished by himself. The evidence in this case tends to show that he pleaded guilty, in the proceeding in the Vermilion county circuit court, to the charges made against him in the information there relating to the divorce cases, only for the purpose of avoiding a trial upon the other charges, made in said information, which did not relate to the divorce cases. One of the members of the bar, assisting the State's attorney in the prosecution in Vermilion county, states that the defendant said: "If I plead guilty, you will prosecute me for perjury," and that the State's attorney said that he thought there was no disposition on the part of the bar to send him to the penitentiary. The testimony is conclusive to our minds, that the defendant, Hill, was present with his counsel in the circuit court of Vermilion county when the plea of guilty was entered, and when the judgment of conviction was rendered against him; and that he knew, and understood, and consented to what was there done. Neither the defense set up in his answer, nor the defense put forward in his testimony, is sustained by the evidence.

We are of the opinion, that the charges, made in the information in this case against the defendant, are established by the proof; and that the conduct of the defendant has been unworthy, and of such a character as tends to defeat and corrupt the administration of justice.

Therefore, let the rule in this case be made absolute, and let an order be entered, striking the name of Alonzo R. Hill, respondent herein, from the roll of attorneys of this court in accordance with the prayer of the information filed by the Attorney General.

*Rule made absolute.*

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THE EAST ST. LOUIS CONNECTING RAILWAY COMPANY

v.

THE CITY OF EAST ST. LOUIS.

182	48
192	14

*Opinion filed October 16, 1899—Rehearing denied December 13, 1899.*

1. **EQUITY**—*when bill for injunction is in substance one for specific performance.* A bill praying for an injunction to restrain a city from preventing the construction of street railway by a company claiming the right under an ordinance is in substance a bill for specific performance.

2. **SPECIFIC PERFORMANCE**—*specific performance is not a matter of right.* A party cannot, as a matter of absolute right, have a contract specifically enforced in equity, but the exercise of this power rests in the sound discretion of the court, in view of the terms of the contract and the surrounding circumstances.

3. **SAME**—*when an alleged contract with city will not be specifically enforced.* Specific performance of a contract, whereby a municipality, for a nominal consideration, granted to a company the right to build a street railway, will not be granted, where the company has for over ten years neglected to construct the road, and changed conditions would make the enforcing of performance an injustice.

*East St. L. Con. Ry. Co. v. East St. Louis, 81 Ill. App. 109, affirmed.*

**APPEAL** from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. M. W. SCHAEFER, Judge, presiding.

CHARLES W. THOMAS, for appellant.

B. H. CANBY, and FORMAN & BROWNING, for appellee.

Per CURIAM: The opinion of the Appellate Court for the Fourth District, by CREIGHTON, J., is as follows:

"This was a bill in chancery in the St. Clair circuit court by appellant, against appellee, praying for an injunction restraining appellee, its officers, agents and employees, from preventing or in any manner interfering with appellant in the construction and laying of a railroad track in certain of appellee's streets. At the February term, 1898, the cause was heard on bill, answer, replication and oral evidence, and resulted in an order denying the injunction and dismissing appellant's bill at its cost. Appellant appeals, and assigns as error that the circuit court erred in dismissing its bill and in not decreeing an injunction as prayed.

"On the 6th day of April, 1887, appellee, the city of East St. Louis, passed ordinance No. 483, as follows:

"An ordinance granting the right of way in certain streets therein named to the Belleville City Railway Company and East St. Louis Connecting Railway Company.

*"Be it ordained by the City Council of the City of East St. Louis:*

"Section 1. That in consideration of the sum of three hundred (\$300) dollars to be paid to the city treasurer within thirty (30) days after the passage of this ordinance, by the Belleville City Railway Company and the East St. Louis Connecting Railway Company, or either of them, there is hereby granted to said companies jointly, and to each of them severally, the right to construct and maintain one single or double track railway, with necessary turn-outs, in, along and upon the streets in Illinois City lying next to and north of blocks 59, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, from its most eastern to its most western extremity; and also in, along and upon the street in said city of East St. Louis known as Second street, or New Second street, as said street appears upon a plat recorded in the recorder's office of St. Clair county, Illinois, in plat book 'A,' on pages 227 and 228, from the north-

ern extremity of said Second street to its junction with St. Louis avenue; and also along, in and upon all that part of Illinois avenue, in said city, lying west of the east line of said Second street; and also the right to construct and maintain such railway across any and all streets which it may be necessary to cross in order to follow the route hereinbefore indicated; and also the right to construct and maintain such railway in, along and upon a strip of land twenty-eight feet wide lying south of and adjoining the Chicago and Alton Railroad Company's depot grounds in the ferry division to said city; and also in, along and upon Wiggins street, in said division, and across so much of Second, Third and Fourth streets, in said division, as lies between said strip and Wiggins Ferry street aforesaid.

"Sec. 2. This ordinance shall be in force from and after its passage, but unless the payment hereinbefore mentioned is made as required this ordinance shall be void.'

"This ordinance was published on the 8th day of April, 1887, and at the hour of eleven o'clock A. M. of that day, after the newspaper containing the publication was issued, the companies named in the ordinance paid to the city treasurer the \$300 and took his receipt therefor. Afterwards, on the same day, the city council passed the following ordinance:

"'An ordinance repealing ordinance No. 483, entitled 'An ordinance granting the right of way in certain streets therein named to the Belleville City Railway Company and the East St. Louis Connecting Railway Company,' alleged to have been passed and approved April 6, 1887.

*"Be it ordained by the City Council of the City of East St. Louis:*

"'Section 1. That ordinance No. 483, entitled 'An ordinance granting the right of way in certain streets therein named to the Belleville Railway Company and the East St. Louis Connecting Railway Company,' alleged to



have been passed and approved April 6, 1887, be and the same is hereby repealed.

"Sec. 2. That this ordinance be in full force and effect from and after its passage and promulgation.

"Sec. 3. That the city clerk or mayor is instructed to have this ordinance promulgated and published in the *East St. Louis Gazette* at once."

"This ordinance was duly published on the 9th day of April, 1887. On the 14th day of April, 1887, the city council of said city passed a resolution directing the city treasurer to return to said companies the \$300, with legal interest from the date of payment, and empowering the mayor to attend to the enforcement of the resolution. On the 25th day of February, 1893, the Belleville City Railway Company, for valuable consideration, waived and released all the rights and privileges it had acquired under the first ordinance to the complainant, and agreed not to use or exercise the same. Some time in the month of October, 1897, appellant began to construct its railroad upon some of the streets claimed to be embraced in the ordinance, and appellee interfered by force and prevented appellant from proceeding, and thereupon the bill in this case was filed.

"Appellant contends 'that this was a sale of a right for a money consideration, and no limitation as to the time was put upon its exercise.' In effect the contention is, that the transaction between the city council and appellant was a sale by the city, to appellant, of the right to construct and maintain a railway upon certain public streets at any time in the future that appellant might see fit to do so; that the city council had full power to make such sale and bind the city indefinitely thereby; that the ordinance revoking the right is without power and void, and that neither the revoking ordinance nor the lapse of time furnishes any justification for refusing to allow appellant to now enter and enjoy the privilege.

"If there is any valid contractual relation now existing between appellant and appellee, it is, in effect, an agreement on the part of appellee to permit appellant to construct and maintain a railway upon the streets named. The bill charges, that on the.....day of October, 1897, appellant 'began to construct the railway in and upon one of the streets in the said ordinance mentioned, and the said city, by its police and employees and agents, compelled the servants of your orators to desist from their work in that behalf, and would not allow them, or any of them, to take any steps necessary to construct said railway, and threatened your orator's servants with arrest and violence unless they desisted from such work; that said city, through its police officers and agents, threatens to prevent by force the exercise by your orator of the rights, privileges and licenses granted to it by said ordinance, and unless the said city is enjoined from so doing it will so prevent your orator, and do injury to your orator that will be irreparable and not susceptible of computation, and will make necessary a large number of suits at law.'

"This bill is so far in the nature of a bill for specific performance that we feel called upon to apply in this case the doctrines and rules applicable to such bills.

"In Pomeroy's Equity Jurisprudence (sec. 1341) it is said: 'An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules. It may be stated as a general proposition, that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain a breach by injunction, if this is the only practical mode of enforcement which its terms permit.'

"In *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, the town of Lake had entered into a contract with the Chicago Municipal Gas Light Company, whereby it had granted to said company the right to lay and maintain gas mains and pipes in the public streets. The gas company commenced to lay its pipes in one of the streets embraced within the terms of the contract, and the police of the town, acting under authority of the board of trustees, forcibly prevented the servants of the company from proceeding with the work. Thereupon the company filed a bill in chancery, the object of which was to enjoin the town from interfering with the progress of the work. The court says: 'The bill of complaint in this case, though not strictly a bill for specific performance of a contract, is, in substance, a bill of that kind,' and the court there quotes with approval what we have above quoted from Pomeroy.

"It is the settled doctrine in this State that a party cannot, as a matter of right, have a contract specifically enforced in equity, but that the exercise of this power rests in the sound discretion of the court, in view of the terms of the contract and the surrounding circumstances. (*Phelps v. Illinois Central Railroad Co.* 63 Ill. 468; *McCabe v. Crosier*, 69 id. 501; *Ralls v. Ralls*, 82 id. 243; *Beach v. Dyer*, 93 id. 295; *Hetfeld v. Willey*, 105 id. 286.) In *Chicago, Burlington and Quincy Railroad Co. v. Reno*, 113 Ill. 39, it is held that no positive rule can be laid down by which the action of the court shall be governed in such cases, but that a bill for the specific performance of a contract is addressed to the sound discretion of the court, and that relief will not be granted as a matter of course, although a legal contract may be shown to exist. It will not be granted where it would be inequitable to do so, nor where to do so would interfere with public interests. The evidence shows that during all the time for more than ten years after the passage of the ordinance granting the right and the one revoking the grant, neither appellant nor its co-grantee

made any attempt to exercise the rights now claimed, nor made any expenditure on the faith of the grant, but apparently, during all that long period, acquiesced in the action of the city council revoking the grant. During that time the city has doubled in population; has become incorporated under the general law; the streets have been extended; the city has erected, at a cost of \$50,000, a public school building abutting upon one of the streets embraced in the grant, and many private residences have been erected along the streets and are occupied by citizens of the city. The court will not decree specific performance of a contract grossly unequal in its terms, nor where the complainant has been guilty of *laches*, and by lapse of time such changes in condition have taken place as to make the enforcing of performance an injustice. *Taylor v. Merrill*, 55 Ill. 52; *Iglehart v. Gibson*, 56 id. 81; *Kimball v. Tooke*, 70 id. 553; *Beach v. Dyer*, 93 id. 295.

"We regard the money consideration paid for the granted right as merely nominal. The substantial consideration must have been the anticipated advantage to the city and the public to result from the building and maintaining of the proposed railroad. The delay for so many years to build the railroad was gross *laches*. The conditions in the city greatly changed during that long delay. To decree specific performance at this late date would be inequitable and unjust, and would also interfere with public interests. The decree of the circuit court is affirmed."

We have carefully considered the questions presented by this record and given full examination to the questions presented by the brief of the appellant. From that examination we are compelled to concur in the opinion of the Appellate Court, which we adopt as the opinion of this court.

The judgment of the Appellate Court for the Fourth District is affirmed.

*Judgment affirmed.*

CHARLES W. HINKLEY

v.

ALANSON H. REED *et al.**Opinion filed October 16, 1899—Rehearing denied December 8, 1899.*

1. APPEALS AND ERRORS—*when judgment of Appellate Court is conclusive.* A judgment of the Appellate Court settling a question of fact against the appellees, from which the appellees neither appeal nor assign cross-errors upon the further appeal by the appellant, is conclusive upon the Supreme Court as to such question.

2. VOLUNTARY ASSIGNMENTS—*general assignment does not pass title to property previously fraudulently conveyed.* A general assignment for the benefit of creditors does not pass to the assignee any interest in property which had been fraudulently transferred by the assignor before the assignment, nor any right to impeach or set aside such fraudulent transfer.

3. FRAUD—*fraudulent conveyance prior to assignment is ineffectual as against judgment creditors.* A fraudulent conveyance of property made by a debtor prior to a general assignment for the benefit of creditors is ineffectual and inoperative as against a judgment creditor by whom it may be impeached.

*Hinkley v. Reed*, 82 Ill. App. 60, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

M. B. & F. S. LOOMIS, for appellant.

SAMUEL M. BOOTH, for appellees.

MR. JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding by creditor's bill, begun in the circuit court of Cook county by Charles W. Hinkley, against Alanson H. and J. Warner Reed, principal defendants, individually and as co-partners, under the name of A. Reed & Sons, and against them and others as a corporation by the same name, to subject the assets of the partnership to the payment of a judgment of \$595.19 in his favor, recovered May 31, 1898, in the Cook county circuit court.

The bill alleges that the principal defendants, as partners, have been for several years before this time engaged in manufacturing and selling pianos under the firm name of A. Reed & Sons, having a main office at Chicago and a factory at Dixon, Illinois. On May 27, 1898, being insolvent and indebted to complainant, the partnership conveyed all its assets to a corporation styled A. Reed & Sons, which had been recently organized and chartered. As a consideration for this transfer Alanson H. Reed and J. Warner Reed received each two hundred and fifty shares of paid-up, non-assessable capital stock of the corporation. The corporation did not, at the time of the transfer, assume and agree to pay the debts of the partnership. After the transfer the business appears to have been conducted in all respects as it was before. On the following day the Reeds, in their individual capacity and as partners, made an assignment of their assets (which then consisted only of the shares of stock) to George M. Signor for the benefit of their creditors. In a proceeding subsequently thereto by the New York Life Insurance and Trust Company against the principal defendants herein, the transfer to the corporation was held void because it did not thereby assume the payment of the debts of the partnership. The corporation soon afterwards, on July 8, 1898, by resolution, assumed the payment of that indebtedness, and then made an assignment of all its assets to the Chicago Title and Trust Company, as assignee, for the benefit of its creditors.

The prayer of the bill is that the transfer by the partnership to the corporation, and the voluntary assignment by the Reeds of their assets (being the stock) to Signor, and the assignment of the corporation to the Chicago Title and Trust Company, be held fraudulent, and that the Chicago Title and Trust Company be decreed to hold all of said property and assets in trust for the principal defendants, and that the said assets be subjected to the payment of the judgment of complainant. The principal

defendants answered, admitting all the material allegations of the bill except those alleging fraud. Upon the hearing the bill was dismissed. Hinkley appealed to the Appellate Court, where the transfer by the partnership to the corporation was held void, but that court found the assignment of the Reeds to Signor, on May 28, 1898, for the benefit of their creditors, was valid and effectual as a voluntary assignment to invest Signor with title to all of the assets and property of the Reeds for the benefit of their creditors, including the property attempted to be transferred to the corporation, and that the assignment by the corporation to the Chicago Title and Trust Company was ineffectual and inoperative. The judgment of the Appellate Court failing to give the relief prayed in the bill,—the holding being, in effect, that the complainant, who obtained his judgment on May 31, 1898, a few days after the fraudulent transfer, is entitled to no preference,—Hinkley prosecutes this further appeal.

The question as to whether the transfer by the partnership to the corporation was legal is not before this court. The Appellate Court, by its judgment, settled that point in favor of appellant, and appellees have neither prosecuted an appeal from that judgment nor assigned cross-errors upon this record. We cannot, under this state of the record, go behind the judgment of the Appellate Court in that regard.

The only errors assigned here are by appellant, questioning the judgment of the Appellate Court in so far as it holds the assignment by the Reeds of May 28, 1898, a valid assignment of all of their property, including that attempted to be transferred to the corporation.

We think the Appellate Court erred in holding that the assignment to Signor was effectual to pass title to the property previously conveyed by the parties to the corporation,—first, because it clearly appears from the allegations of the bill, the answer and the facts shown, that it was not the intention of the Reeds to pass any-

thing by that assignment except the stock which they had received for the property transferred; and second, the scheme of transferring the property to the corporation being fraudulent and void as to creditors, the subsequent general assignment could not pass to the assignee property attempted to be transferred by the previous fraudulent conveyance. It is well settled that a general assignment for the benefit of creditors does not pass to the assignee any interest in property before fraudulently transferred by the assignor, nor any right to impeach or set aside such fraudulent transfer. Such right belongs to the creditors alone. (*Bouton v. Dement*, 123 Ill. 142, and cases cited.) The transfer was good between the parties, and is voidable only at the instance of interested third persons. As to the appellant, a judgment creditor, the fraudulent transfer to the corporation and the assignment by the Reeds of their stock to Signor, as well as the assignment subsequently attempted to be made by the corporation to the Chicago Title and Trust Company, are ineffectual and inoperative. Upon these facts, treating the transfer to the corporation as fraudulent, both assignments are void, and the trust company holds the property subject to the judgment creditors of the Reeds, and a court of equity, under this creditor's bill, may direct the application of those assets to the satisfaction of appellant's judgment.

The judgment of the Appellate Court holding the assignment to Signor effectual to pass to him title to all the property of the Reeds, including that previously attempted to be transferred to the corporation, will be reversed and the cause remanded to the circuit court, with direction to proceed in conformity with the views here expressed.

*Reversed and remanded.*



MARSHALL W. WEIR, Assignee,

v.

RICHARD MOWE *et al.**Opinion filed October 16, 1899—Rehearing denied December 13, 1899.*

1. VOLUNTARY ASSIGNMENTS—*county court has exclusive jurisdiction in voluntary assignments.* The county court has, under the Voluntary Assignment law, exclusive jurisdiction to control the application of the assets of an insolvent estate to the payment of claims, and a decree of the circuit court ordering payment of a claim by the assignee as a preference is not of binding force.

2. SAME—*when general creditors are not bound, by decree awarding preference, to particular claim.* A decree awarding a specified claim preference in the settlement of an assigned estate is not binding upon the general creditors of the assignor where they were not made parties to the proceeding, although both the assignor and the assignee appeared.

3. SAME—*general creditors are not privies of assignor or assignee.* The general creditors of an assigned estate are not privies of the assignor or assignee, so as to be bound by a decree awarding preference to a claim, and rendered in a proceeding in which the assignor and assignee appeared but to which the creditors were not parties.

4. SAME—*when assignee may be charged with money he has not actually received.* An assignee for the benefit of creditors may be charged with money which he never actually received, if in his report he treats it as assets and claims credit for its disbursement.

5. The objection that the trust property involved was never the property of the insolvent trustee, and hence did not pass to his assignee, is determined in *Estate of Seiter v. Mowe*, (*ante*, p. 351).

PHILLIPS, J., dissenting.

*Weir v. Mowe*, 81 Ill. App. 287, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the County Court of St. Clair county; the Hon. E. C. RHOADS, Judge, presiding.

TURNER & HOLDER, for appellant:

The assignee of an insolvent debtor, under a voluntary assignment, is not an innocent purchaser for value.

182	444
100a	1662
100a	1666
182	444
104a	24

He takes the property assigned subject to all equities, liens and encumbrances, whether created by operation of law or by the act of the insolvent, which existed against the same in the hands of the insolvent. His title is subject to every infirmity by which it was affected in the hands of the assignor. Burrill on Assignments, (6th ed.) 482, 483; Candlish on Assignments, secs. 149, 150, and cases cited; *Brown v. Brabb*, 67 Mich. 17; *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125, note; *Meyers v. Board of Education*, 51 Kan. 87; *Peak v. Ellicott*, 30 id. 156; *Independent District v. King*, 80 Iowa, 497; *Ryan v. Phillips*, 3 Kan. App. 704; *Hazeltine v. McAfee*, 5 id. 119; *Bank v. Sanford*, 62 Mo. App. 283; *I. X. L. Co. v. Chonreich*, 65 id. 283; *Insurance Co. v. Kimble*, 66 id. 370; *Synod v. Schoenich*, 45 S. W. Rep. 647; *Pundmann v. Schoenich*, id. 112; *Davenport Plow Works v. Lamp*, 80 Iowa, 722; *Phillips v. Overfield*, 100 Mo. 466; *Ulrici v. Boekeley*, 72 Mo. App. 61; *Harrison v. Smith*, 83 Mo. 210; *Stotler v. Coats*, 88 id. 514; *Chase v. Chapin*, 130 Mass. 131; *Bank v. Insurance Co.* 104 U. S. 54; *Peters v. Bain*, 133 id. 670; *Bank v. Gillespie*, 137 id. 421; *Wetherell v. Building Ass.* 153 Ill. 365; *Halle v. Bank*, 140 id. 413; *Hooven v. Burdette*, 153 id. 672; *Schwartz v. Messinger*, 167 id. 472; *Davis v. Dock Co.* 129 id. 180; *Jones v. Kilbreth*, 49 Ohio St. 401; *Phenix Milling Co. v. Anderson*, 78 Ill. App. 261; *O'Hara v. Jones*, 46 Ill. 288.

The assignee for the benefit of creditors is the agent of the assignor for the distribution of the property assigned. He takes no greater or other interest in the property assigned than the assignor had. Any property held in trust for another by the assignor does not pass to the assignee by the assignment. Flint on Trusts and Trustees, sec. 240; *Ludwig v. Heighley*, 5 Barr, 132; 24 Am. & Eng. Ency. of Law, 21; *Bank v. Wheeler*, 74 Ill. App. 261; *Jones v. Kilbreth*, 49 Ohio St. 401.

A trustee cannot lawfully intermingle the trust property with his own, and if there is a breach of trust by a trustee in this respect, the trust funds may be followed

into the hands of a purchaser for value, if he had notice of it, and into the hands of one not purchasing for value, whether he had notice of the breach or not. Flint on Trusts and Trustees, sec. 316; 27 Am. & Eng. Ency. of Law, 251; *Norton v. Hixon*, 25 Ill. 371; *Attorney General v. Agricultural College*, 85 id. 516; *Henry County v. Drainage Co.* 52 id. 454; *Insurance Co. v. Spaid*, 99 id. 251; *Fast v. McPherson*, 98 id. 469; *Sholty v. Sholty*, 140 id. 81; *Halle v. Bank*, 140 id. 413; Original Assignment Act, sec. 11; Starr & Cur. Stat. chap. 72, sec. 47; *Hopkins v. Burr*, 24 Col. 502; *Bank v. Insurance Co.* 104 U. S. 54; *Peters v. Bain*, 133 id. 670.

The circuit court had jurisdiction to make the order directing that the trust fund belonging to this insane man, which had been unlawfully intermingled with the individual funds of the trustee, should be separated from the funds of the trustee and turned over to his successor. There being a trust, nothing is better settled than that a court of equity has jurisdiction to enforce an account and surrender of the trust property at the time when the trustee should have done so but had refused. *Ellsworth v. Ames Co.* 125 Ill. 225; 27 Am. & Eng. Ency. of Law, 245; *Weaver v. Fischer*, 110 Ill. 146; *Russell v. Bank*, 139 id. 538; *Reese v. Wallace*, 113 id. 594; Const. art. 6, sec. 12.

A court of equity has jurisdiction to enforce trusts, and the trust property may be followed by a court of equity into the hands of purchasers and assignees who are mere volunteers or who had notice of the existence of the trust; and this jurisdiction is not taken away by the fact that the party has a remedy at law, especially where the party seeking relief is entitled to a discovery, or where the trustee is bound to state an account of the trust and its proceeds. Candlish on Assignments, sec. 269; Burrill on Assignments, (6th ed.) sec. 441; *Gregory v. Bank*, 171 Mass. 67; *Dias v. Brunells*, 24 Wend. 10; *Cheney v. Langley*, 56 Ill. App. 86; *Halle v. Bank*, 140 Ill. 413.

HORNER & WINKELMANN, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from the Appellate Court for the Fourth District. The questions involved grow out of an assignment proceeding in the county court of St. Clair county, in which appellant, M. W. Weir, was appointed assignee of the insolvent estate of Henry Seiter. As in the case between the same parties involving a claim in favor of Lucetta Nichols, the contention of appellant is that the county and Appellate Courts erred in holding that a claim in favor of Lucius D. Turner, conservator for James H. Riggan, was not entitled to preference as a claim for trust funds over the general creditors of Henry Seiter.

It appears from the opinion of the Appellate Court that there the appellant insisted upon two reasons why the judgment of the county court disallowing that claim should be reversed: First, because the trust fund, which amounted in this case to \$14,181.42, was never the property of Seiter, and therefore did not pass to his assignee; and second, that a certain decree entered in the circuit court of St. Clair county was binding upon all the parties to that proceeding, and was *res judicata* as to the claim in question in this case. The first of these reasons is, in substance, the grounds of reversal urged in the case involving the Nichols claim, and what we have said in the opinion filed in that case must be held to dispose of the same here.

The second ground of reversal is based upon the fact that the circuit court of St. Clair county, upon a petition filed by Turner, as conservator of Riggan, against Seiter, and Weir as his assignee, after the assignment of December 10, 1895, entered a decree to the effect that the claim here in question was entitled to preference in the settlement of the assigned estate, and ordering the assignee to pay the same in full out of the over-drafts due the bank, as soon as the same should be collected. The Appellate

Court, in its opinion by WORTHINGTON, J., we think has disposed of that question properly, in the following language:

"The only remaining question to be considered is the effect of the decree of the circuit court made June 20, 1898, upon the petition of Turner against Seiter, and Weir, as assignee. If the circuit court had jurisdiction, as against appellees, to decide upon the priority of claims against the Seiter estate in the hands of the assignee by virtue of the deed of assignment, or to decide that certain assets in the hands of the assignee, scheduled by Seiter as his property and so inventoried by the assignee, were not his property but were the property of James H. Riggin, and therefore subject to the claim of Turner, as trustee, then this question is *res judicata*, and the decree of the circuit court is binding, not only upon the assignee, but upon the county court and upon all the creditors of Seiter.

"When the assignee took possession of the assets of Seiter the county court had exclusive jurisdiction in controlling their application in the payment of claims. It had power to pass upon the character of claims, to investigate liens and to equitably adjust priorities, to the same extent that a court of chancery might do. Any other construction of the Assignment law would open the door to confusion and conflicts of jurisdiction. There may be special instances, as in the enforcement of a mechanic's lien, in which a circuit court may have jurisdiction to enforce the lien when the property of a debtor is in the hands of an assignee; but there must be reasons for these special instances growing out of the character of the lien, or because it cannot be enforced except in the circuit court. The decisions of the Supreme Court of this State clearly establish this doctrine. The case of *Freydendall v. Baldwin*, 103 Ill. 330, is a leading case upon this point and has been repeatedly followed. It is there said: 'Thus it is seen that the whole management of the estates of insolvent debtors, under voluntary assignments,

is committed to the jurisdiction of county courts, and by section 14 full authority and jurisdiction are given to such courts in regard to such matters. How the trust funds in the hands of the assignee are to be paid over and distributed are matters for the determination of the county court where such proceedings are pending, and its judgments and orders in that respect can only be reviewed as the judgments and decrees of other courts of competent and original jurisdiction are reviewable by appellate courts. It was entirely competent for the General Assembly to confer such jurisdiction on county courts, and their jurisdiction in such matters is too manifest to be disputed. Certainly a court of chancery will not assume jurisdiction on a bill to interfere and direct how the county court shall distribute a fund over which it has full and complete jurisdiction by positive statute, unless under special circumstances.' To the same effect are *Hanchett v. Waterbury*, 115 Ill. 220; *Farwell v. Crandall*, 120 id. 70; *Wilson v. Aaron*, 132 id. 238; *Newman v. Commercial Nat. Bank*, 156 id. 530; *Plume & Atwood Manf. Co. v. Caldwell*, 136 id. 163; *Osborne v. Williams*, 34 Ill. App. 423; *Brown v. Stewart*, 159 Ill. 212.

"In *Clark v. Burke*, 163 Ill. 334, it is said: 'We have held in *Freydendall v. Baldwin*, 103 Ill. 330, *Hanchett v. Waterbury*, 115 id. 220, and other cases, that the county court, under these provisions, has complete control over the settlement of assigned estates, and that other courts have no power to interfere with the exercise of that jurisdiction. In other words, the county court, in the settlement of insolvent estates, under this statute, is not, as seems to be assumed by counsel for appellant, a court of limited jurisdiction, but, on the contrary, in such matters is not only a court of general but of exclusive jurisdiction.'

"It follows from this construction of the Assignment law that the circuit court was without authority to interfere with the distribution of the Seiter assets in the hands of the assignee.

"Nor do we think, even if it were held that this was one of the special cases in which it might assume jurisdiction, that its decree was binding upon appellees. An examination of the petition and decree discloses these facts: Neither appellees nor any of the general creditors of Seiter were parties to this proceeding, nor were they in any way represented in it. Seiter, by his deed of assignment, passed to his assignee the legal and equitable title of all the property scheduled, including over-drafts, absolutely and beyond his control. (*Browne-Chapin Lumber Co. v. Union Nat. Bank*, 159 Ill. 458.) Nothing that he might say or do subsequent to the assignment could affect the title or character of any asset so conveyed. The general creditors were not then represented by Seiter. Weir, the assignee, was not the agent of the general creditors. He was the agent of Seiter for the distribution of the assets in his hands as assignee. (*Bouton v. Dement*, 123 Ill. 142; *Hanford Oil Co. v. First Nat. Bank*, 126 id. 584.) He did not, therefore, represent the general creditors. Appellees, as general creditors, had an interest in the assets in the hands of the assignee from the date of proving their claims. (*Levy v. Chicago Nat. Bank*, 158 Ill. 88; *Gibson v. Rees*, 50 id. 383.) They were therefore entitled to be represented in any proceeding that affected their interests. If not represented in such proceeding they were not concluded by any judgment or decree entered in it. Neither would such judgment or decree, or any finding of fact stated in it, be competent evidence against them in any subsequent proceeding. In *Brush v. Fowler*, 36 Ill. 53, it is said: 'We understand the doctrine to be universally recognized that no one can be injuriously affected by a judgment or decree of any court who was not a party to such judgment or decree.' To the same effect is *Broom's Legal Maxims*, sec. 758; 1 *Greenleaf on Evidence*, sec. 523; *Schulz v. Schulz*, 138 Ill. 665.

"Neither can it be said that appellees are privies, so as to be bound by the appearance of either Seiter or of

his assignee. After the date of the assignment, December 10, 1894, neither of them could do or say anything that would affect the interests of appellees. The evidence shows that the petition of Turner to the circuit court was filed, not only after the assignee had taken possession of the estate, but also after notice to creditors to file claims had been given, and also after both Turner and appellees had filed their claims. Appellees were not then privies to either Seiter or Weir, and so not represented by them.

"It may be said, further, that the finding upon which the decree is based, namely, that the over-drafts represented the Riggin fund, is not based upon any issue tendered in the petition. It is a finding of fact where there is no allegation to warrant the finding. After alleging the appointment of Seiter as trustee, and his failure to turn over the fund to Turner, the petition alleges: 'Your petitioner further represents that the said Henry Seiter, on the 10th day of September, 1894, made, executed and delivered to Marshall W. Weir a deed of assignment assigning and transferring to said Weir all of the property, real and personal, of him, the said Henry Seiter, for the benefit of the creditors of said Seiter, including the funds of said James H. Riggin, insane, in the hands of said Seiter, trustee, as aforesaid.' And again, in the prayer of the petition: 'That upon a hearing hereof the said Henry Seiter may be ordered to pay and turn over to your petitioner the trust fund so found to be in his hands; that in case the said Henry Seiter has transferred and turned over to his assignee, the said Marshall W. Weir, the said trust fund, intermingled and mixed with his individual property, then he, the said Weir, may be ordered and adjudged and decreed to turn over and pay to your petitioner the said trust fund in full, with legal interest thereon from January 14, 1895, out of the first funds coming into his hands as such assignee, and that your petitioner may be decreed to have a first and prior lien upon



all the funds in the hands of Weir, as assignee, for the payment of the trust fund.'

"It will be seen from these quotations from the petition that there is no averment in it that the Riggin fund had been kept separate by Seiter or was in any way separate and distinguishable from other assets in the hands of his assignee, or that it was represented by any over-drafts. Yet the finding in the decree is, 'that between the seventh day of February, 1894, and December 10, 1894, there was paid out of the bank of Henry Seiter & Co., in over-drafts, to sundry customers of said bank, the sum of \$23,546.07; that in said over-drafts was included the said trust fund belonging to James H. Riggin,' and further finds that Weir, as assignee, is collecting such over-drafts, together with the assets of Seiter.

"The decree orders that Weir, as assignee, pay to Turner, the trustee, the sum of \$14,025.59, with interest from January 14, 1895, or such part thereof as he can realize out of the assets in his hands designated as over-drafts, and that said sum of \$14,025.59, included in said assets as over-drafts, is the property and funds of said trust fund belonging to said Riggin, etc. In other words, without it having been so alleged in the petition, the decree finds that \$14,025.59, being the Riggin fund, is a part of \$23,546.07 owed by debtors to Seiter and represented by over-drafts on the Henry Seiter & Co. bank, in the hands of assignee. It invades the jurisdiction of the county court, which alone has authority to direct the distribution of the insolvent's estate, by ordering that \$14,025.59 of these over-drafts should be applied in payment of the Riggin fund. As the county court, in the case at bar, rightly holds that there is no evidence before it to show that the Riggin fund is embraced in the over-drafts, there results the natural conflict and confusion in administration which an interference by one court claiming jurisdiction with another court having jurisdiction is likely to cause.

"This further fact appearing in evidence is proper to be noted: Both Turner, the trustee, and Weir, the assignee, are sureties on Seiter's bond, as trustee, for \$25,000. Turner petitions to have the Riggins fund declared a lien and entitled to priority of payment. Weir and Seiter respond. The petitioner and the respondent Weir are both sureties on Seiter's bond. Seiter is interested to protect his bondsmen. All parties to the petition, then, are interested in having \$14,025.59 taken out of the fund in the assignee's hands for the payment of general creditors and applied specially in payment of the claim for which Turner and Weir are sureties. No one interested in opposing the petition is made a party. It is not easy to imagine a proceeding in which both complainant and defendants would more heartily and harmoniously desire the same decree.

"We conclude, then, that the decree of the circuit court was not competent evidence to prove that the Riggins fund was embraced in the over-drafts; that the court being without jurisdiction, its decree is not binding upon the county court, the assignee, or upon appellees; that the evidence in the case at bar fails to show that the over-drafts include the Riggins fund, but does show that this fund was mixed and mingled with the money in the Seiter bank and is incapable of separation or identification."

It is claimed by counsel for appellant, in their brief, that the county court could not legally make an order charging the assignee with the \$14,181.42, because, as is said, that money never came into his hands. It appears that by a certain agreement between creditors of Seiter he was to make good certain over-drafts to the bank. He was assisted in doing so by friends, who paid a certain amount in cash and gave their notes for the balance. It seems that the cash was received by the assignee, but it is claimed that the notes were delivered directly to Turner in satisfaction of this Riggins claim. While it is

therefore true that the assignee did not actually receive the notes amounting to the \$14,181.42, it is shown by his report and the proceedings in the county court that he treated them as assets in his hands and claimed credit for the payment of the claim in full.

We find no sufficient reason for disturbing the judgment of the Appellate Court, and it will accordingly be affirmed.

*Judgment affirmed.*

Mr. JUSTICE PHILLIPS, dissenting.

# PETER FORTUNE

v.

## BAYARD STOCKTON et al.

*Opinion filed October 19, 1899—Rehearing denied December 9, 1899.*

1. PRINCIPAL AND AGENT—*power to collect is not implied in power to loan.* It cannot be inferred, in the absence of such usage, that an agent to loan money is empowered to collect it.

2. SAME—*when party paying debt to trustee is chargeable with notice of his want of power to receive payment.* One who pays to the trustee named in a trust deed the debt secured thereby, which he is not authorized to receive, and takes from him a release but does not obtain the notes, which are not in the trustee's possession, is chargeable with notice of the trustee's want of power to receive payment.

3. SAME—*when charges against agent do not make principal responsible for his subsequent acts.* Charges against an agent do not make the principal responsible for a subsequent act of the agent beyond the scope of his actual or implied authority, and in a transaction other than that concerning which complaint was made.

4. PAYMENT—*when payees of notes secured by trust deed are not bound by payment to trustee.* The payees of notes secured by a trust deed are not bound by payment to the trustee before maturity, in reliance upon his false representations, when he had neither actual nor implied authority to receive it, although he released the trust deed, where the notes were not surrendered but remained in the hands of the payees, who had no knowledge of the payment.

*Stockton v. Fortune*, 82 Ill. App. 272, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

FREDERICK S. BAKER, (STILLMAN & MARTYN, of counsel,) for appellant:

A principal will be bound by payment to his agent before maturity, if, from the course of dealing between them or from the facts of the particular transaction, it can reasonably be inferred it was intended the agent has authority to receive such payment,—and this whether the agent has possession of the note or not. Mechem on Agency, sec. 796; Story on Agency, (9th ed.) sec. 172; *Thompson v. Elliott*, 73 Ill. 221; *Mason v. Bauman*, 62 id. 81; *Insurance Co. v. Maguire*, 51 id. 350.

It has been held in cases exactly parallel to the case at bar, that the agent in each case was the general agent of the mortgagee to accept payments of principal and interest upon loans negotiated by such agent, and that the mortgage debts were fully discharged by payments made to the agent. *Security Co. v. Christy*, 33 Fed. Rep. 22; *Security Co. v. Richardson*, id. 16; *Kent v. Congdon*, id. 228.

Where a non-resident client and principal has for many years sanctioned the practice of the public in going to his attorney for information about matters in charge of such attorney and agent, such client and principal will be bound by the representations of such attorney and agent as to matters peculiarly in his charge, whether such representations be true or false. *Willard v. Buckingham*, 36 Conn. 395; *Lobdell v. Baker*, 1 Metc. (Mass.) 201; *Johnson v. Barber*, 5 Gilm. 430; Mechem on Agency, sec. 717; Story on Agency, (9th ed.) sec. 138; Wharton on Agency, sec. 158.

Where a principal deals through another acting as his agent and representative, and, after information of such agent's previous dishonesty and fraudulent acts in the

conduct of such business, (which dishonesty and fraudulent acts are not generally known,) continues to permit such agent to act for him, then such principal is guilty of negligence, and in case of loss through the act of such agent, acting within the apparent or declared scope of his authority, such negligent principal, and not the innocent party so dealing with such agent, must be the loser. Estoppel is a question of ethics. *Railroad Co. v. Schuyler*, 34 N. Y. 59; *Dezell v. Odell*, 3 Hill, 225; *Scott v. Magloughlin*, 133 Ill. 35.

MONTGOMERY & HART, (HATCH & RITSHER, of counsel,) for appellees:

Possession of the securities is, in the absence of actual authority or a known course of dealing, indispensable evidence of authority to receive the principal of the debt. *Stiger v. Bent*, 111 Ill. 328.

Authority of an agent to receive interest or principal on a mortgage cannot be inferred from the fact that the agent had collected and paid over to the mortgagee interest on other mortgages. From authority to collect the interest upon a mortgage authority to collect the principal cannot be inferred, where the agent is not in possession of the securities. *Dunlap's Paley on Agency*, 274.

Before the maturity of the securities, even possession of them is, in the absence of actual authority or a known course of dealing, insufficient evidence of authority to receive payment. *Thompson v. Elliott*, 73 Ill. 221; *Smith v. Kidd*, 68 N. Y. 130; *Bagnell v. Walker*, 46 S. W. Rep. 126.

Payment before maturity involves an alteration of the original contract. *Railway Co. v. Wiggins*, 46 S. W. Rep. 731.

A release of a trust deed by the trustee, when the note thereby secured has not been paid to the owner of it and such owner has not authorized it, has no effect, as between the parties or subsequent purchasers with notice. *Insurance Co. v. Eldredge*, 102 U. S. 545; *Stiger v. Bent*, 111 Ill. 328.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

On April 2, 1887, Emma A. Leahy (now Emma A. Elliot) executed her note for \$5500, payable March 1, 1890, to appellees, Bayard Stockton and LeRoy H. Anderson, trustees for the children of Sarah J. Conover, with interest payable semi-annually, and secured the same by a trust deed to Isaac E. Adams, trustee, on a lot in Chicago. Afterward, on October 1, 1888, she executed another note for \$4500, payable five years after date, to the same parties, with interest payable semi-annually, and secured the same by a trust deed to the same trustee on substantially the same property. The notes were for money borrowed, and Isaac E. Adams negotiated the loans and sent the notes to appellees. Said Isaac E. Adams held a general power of attorney from her dated May 26, 1885, and on November 22, 1889, before the maturity of either of the notes, she contracted in writing, by her said agent, to sell said premises to the appellant, Peter Fortune. She made and acknowledged her warranty deed November 30, 1889, conveying the premises to Fortune. On December 2, 1889, Adams, as trustee, executed releases of the trust deed and Fortune paid to Adams the amount of the indebtedness thereby secured, but the notes were not in the hands of Adams and were not surrendered. The conveyance and releases were filed for record December 3, 1889. The payment to Adams was without the knowledge of the payees, Stockton and Anderson, and the notes remained in their hands, and Adams paid the semi-annual interest as it matured for about three years after he had released the trust deed, when default was made in such payment, and the bill was filed in this case September 11, 1893, to foreclose the trust deed. The answers of Emma A. Elliot, Greenville P. Elliot and Peter Fortune set up the payment in full of the notes to the trustee as a defense to the foreclosure, and alleged his authority, as

agent, to receive such payment. Other defendants answered with a general denial of the allegations of the bill. The cause was referred to a master in chancery to take the testimony and report the same with his conclusions. He reported that the evidence did not show any authority on the part of Adams to receive the payment or execute the releases, and he recommended a decree of foreclosure in accordance with the prayer of the bill. The defendant, Peter Fortune, excepted to the report, and on a hearing the court sustained his exceptions and dismissed the bill for want of equity, at the cost of complainants. On appeal to the Appellate Court that court reversed the decree and remanded the cause, with directions to enter a decree in conformity with the report and recommendation of the master in chancery.

The question in the case is whether the payment made to Adams was a payment to the complainants. The just rule of the law is, that a person shall not be bound by the act of another who assumes to act for him and in his behalf, where he has neither authorized the assumed agent to do the act nor conferred apparent authority upon him. Where one assumes to act for another, that fact is notice to those who deal with him that there must be a delegation of authority from the principal, and they are bound to ascertain its existence and extent. In ascertaining such authority of the agent a third person may rely upon the apparent authority which the alleged principal holds the agent out as having, because to permit the principal to repudiate the authority in such a case would be to enable him to commit a fraud on other parties. In this case there was no authority conferred upon Adams to receive payment, either expressly or by implication. The complainants did not intend to, and did not, delegate to him such authority. Adams was a lawyer living in Chicago, and he wrote to complainants several letters proposing to make loans of trust funds in their hands upon the security of Chicago real estate. On De-

ember 24, 1886, complainant Stockton wrote to Adams, agreeing to take a loan so proposed and outlining the method of doing the business. Adams replied by telegram and letter, and under the arrangement entered into twenty-six loans were made from 1886 to 1893. The arrangement was that Adams would procure applications for loans and forward them to complainants, who would determine whether they would accept the loans. Adams was to furnish an appraisal of the value of the property. If the loan was accepted Adams was to procure the necessary papers to be executed and forward them, except the one that would have to be recorded, together with his opinion of the title, and a draft for the amount of the loan at one day's sight. When that was done they would accept the draft or forward a draft for the money. After the trust deed was recorded he would send that, and complainants in all cases held the securities. When interest matured Adams usually received the money from the borrower and remitted it to complainants, who then sent the coupon to be surrendered, and sometimes complainants sent to Adams coupons that were due, for collection. In a few instances borrowers desired to pay off the loans before maturity. In these cases Adams wrote to complainants for their consent, and if they were willing, the original papers and abstract were sent to him, with instructions. In this case Adams wrote to complainants October 10, 1889, as follows: "Mrs. Leahy has been made an offer for her property and buyer desires to pay cash. I have stated that without your consent I have no power to release, but that I would lay the matter before you." Complainants replied: "We would prefer not to release the Leahy mortgage, unless our action would be productive of real, substantial loss to her." Adams had a partner, Hamilton, and the answer was in the firm name, as follows: "We will refer your answer to Mrs. Leahy." On November 20, 1889, Adams again wrote: "Have you the abstracts for the Leahy loan, corner Wood and Madi-



son streets? If so, will you please forward the same immediately? Mrs. Leahy will probably sell the property. As to taking up the loans existing on the same, we tried to arrange to let them lie, but we cannot yet state." He further said they had two or three very good applications for loans, which they would hold in case it should become necessary to take the money if complainants should desire to place it there, as well as some other money that was coming in. On November 22, 1889, complainants sent the Leahy abstract by express, and wrote saying they hoped Adams could arrange to have the loans remain without change. The next day Adams again wrote that Mrs. Leahy was obliged to request a clearance of the loans, and saying, "Mrs. Leahy will pay interest to date of re-investment, and I have assured her, in the light of your last favor on this subject, that I thought you would consent to release, though you did not like to do it." On November 30, 1889, Adams wrote about other applications, saying that he would advise complainants the first of the next week how the money had better be divided up, and concluding: "At the same time I will give you date when Leahy money will be ready for your order, and ask you at that time to forward note, trust deed, etc., in your possession."

• Now, it is evident from these letters that the complainants were willing, under the circumstances, to receive payment before the maturity of the notes and to re-invest the money with other funds, and expected to send the notes and trust deeds to Adams, with directions, whenever the transaction was ready to be closed, but they never sent the securities nor gave the authority and were not called upon to do so. Adams got a check payable to his own order and converted the money to his own use without the knowledge of complainants. The understanding, and the only understanding, was that Adams would look over other applications and decide which it was best to accept, and if the sale by Mrs. Leahy was

effected, would send for the notes. After the trust deeds had been released he wrote complainants, December 5, 1889: "I will want the Leahy papers early next week, and will send you further word." On January 2, 1890, Adams represented that the Leahy matter was still pending, and on January 9, 1890, wrote: "The Leahy matter has been delayed by sickness of one of the parties, and may be for some time." Afterward he forwarded the interest from time to time as it became due. Adams had never received payment of loans and executed releases without the securities, and there was no implied authority to make the collection in that way. In every one of the loans complainants had the notes before they advanced the money loaned, and in no case did they authorize or permit Adams to collect the principal debt, except as they sent him the security. In one instance complainants sent the security to Adams to receive the money and there was long delay in receiving the remittance, in consequence of which, on September 23, 1888, Stockton wrote him with reference to a payment of a mortgage to be made by Proudfoot, that the application for the new loan to take its place ought to be sent to complainants and the new mortgage drawn, and the notes, abstracts, etc., sent to them before they surrendered the mortgage.

The evidence does not show any appearance of authority in Adams to receive the payment and release the trust deeds. It is not claimed that there was any usage or custom of the business from which Fortune or Mrs. Leahy could have inferred that Adams had power to make the collection. An agent employed to negotiate a contract does not have, as an incident thereto, authority to receive payment, and in the absence of such usage it cannot be inferred that Adams was empowered to collect the money because he was agent to loan it. (*Thompson v. Elliott*, 73 Ill. 221.) It is practically the universal custom to take up and cancel notes when they are paid, and for one who is authorized to collect, to have possession of the notes

and be able to surrender them. Adams did not have possession of these notes, and we think it has uniformly been considered, under like circumstances, that there is no appearance of authority to make the collection. Where an agent has possession of a note that is due, it may be inferred that he has authority to receive payment of it, but such an authority could not be inferred from that fact in a case like this, where the paper was not due. Where a trustee releases a trust deed and receives payment of the debt without actual authority and without producing the securities, the party paying has notice of the want of power in the trustee. (*Cooley v. Willard*, 34 Ill. 68; *Stiger v. Bent*, 111 id. 328.) The inference of authority to receive payment arising from the possession of the securities is founded upon such possession, and it does not exist without possession. 1 Am. & Eng. Ency. of Law, (2d ed.) 1026.

Not only was there no appearance of authority, but Fortune did not rely upon any. Adams made the contract of sale as attorney in fact for Mrs. Leahy, and William J. English was attorney for Fortune. The business was closed up at the office of Fortune's brewery, in Chicago. English inquired for the notes, and Adams answered that he was pressed with business and was going away; that he had made a search in his office for them but they were mislaid; that he had looked for them several days before, and that he wrote to complainants asking them to send them if they had them; that he supposed they would be there on the afternoon mail; that he would send them over or have his partner, Hamilton, do so; that he had purchased his ticket and sleeper to Boston that night, and that his wife was outside the office in a carriage waiting for him; that he was pretty sure the notes were in his office, but mislaid; that he was jointly interested with the complainants, and they owed him quite a large amount of money, and he was really the owner of the money. Fortune asked English what he thought about

it, and he replied that he knew Adams as a reputable lawyer, apparently well off and standing high socially, and that he himself should take his chances on it. Fortune concluded to do so, and made his check payable to the order of Adams, relying on his assertions. This shows clearly that Fortune did not rely upon anything that complainants did, but upon Adams' false statement that he had authority and that he was the equitable owner of the notes. Fortune was not only guilty of negligence in that respect, but he made no inquiry afterward for the notes during a considerable period of time, when Adams was responsible and when no person would probably have suffered if investigation had been made. It was the obvious dictate of common sense and ordinary prudence to have obtained the securities, or at least to have made inquiry when they were not sent as agreed. Instead of following such a course, he left the securities uncanceled and unpaid in the hands of the payees for years.

It appears that Charles D. Seeberger, who had been a very intimate friend of Adams and had quarreled with him, made charges against him to Stockton and Anderson in 1888, and it is argued that they should have withdrawn the agency from Adams on account of said charges, and that by failing to do so they have become responsible for his wrong. Seeberger's disclosures had nothing to do with this transaction, and complainants cannot be held responsible for an act which they neither authorized, nor gave the public or any person reason to suppose they had authorized, on account of anything Seeberger had told them.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

HUGH N. FLEMING

v.

JAMES M. MILLS *et al.**Opinion filed October 19, 1899—Rehearing denied December 7, 1899.*

1. WITNESSES—*when complainants in partition are not disqualified under section 2 of Evidence act.* The son of a grantee does not defend as heir in a suit to set aside the deed and for partition, so as to preclude the complainants from testifying against him under section 2 of the Evidence act, where the validity of the deed as well as the complainants' title rests upon a will under which they all claim.

2. WILLS—*sale to pay child's debt is not within power to sell for support and maintenance.* A widow given by will a life estate in real property, and empowered to sell it for the support and maintenance of herself or family, is without authority to convey the property to pay a debt of one of her children.

3. LANDLORD AND TENANT—*one acquiring possession by collusion with tenants cannot impeach landlord's title.* One who obtains possession of property by collusion with tenants stands in no better position than they, and must deliver up the possession to the landlord before he can maintain a bill to impeach title.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY B. WILLIS, Judge, presiding.

This was a bill for partition, brought by James M. Mills, against Frederick N. Mills, Jennie M. Mills, Katherine L. Mills, Charles Whitcomb and Hugh N. Fleming, for partition of certain premises in Chicago, and to set aside a certain warranty deed executed by Eliza A. Mills to Maria L. Fleming on June 24, 1892.

There is no substantial dispute between the parties in regard to the facts. Royal A. B. Mills was at the time of his death the owner of the property described in the bill of complaint. He departed this life on the twenty-fifth day of January, 1882, leaving him surviving as his only heirs-at-law and next of kin, his widow, Eliza A. Mills, and his four children, James M. Mills, the complainant, Frederick N. Mills, (who has since deceased,) Jennie M. Mills and Katherine L. Mills, the appellees, and also

leaving a last will and testament, the material portion of which, so far as this case is involved, is as follows:

"I give, devise and bequeath to my beloved wife, Eliza A. Mills, all the property, estate and effects of every kind whereof I may die seized or possessed, to her sole and separate use during her life; and I also give my wife full right and power, and at her own discretion, to sell and dispose of all or any part of my said estate, whether real or personal, for the support and maintenance of herself or family. In the event of her death I direct that all my estate that may be left in her hands shall descend to my children and their descendants, if any, such descendants taking the share of the deceased child."

The will bore date April 17, 1875 and was probated in Cook county on July 5, 1882.

On June 3, 1887, the widow, Eliza A. Mills, procured from Margaret F. Layton a loan of \$2000, and to secure the payment of the amount she gave a promissory note for the sum, payable in three years from date, with interest, and she, together with appellees, executed and delivered to David O. Strong, as trustee, a trust deed conveying lot 7 of the property in question, which was duly filed for record. Subsequently Frederick N. Mills (now deceased) received from Hugh B. Fleming, the father of appellant, certain securities and real estate amounting to upwards of \$15,000, a portion of which securities was lost by Frederick N. Mills in speculation, and he was unable to repay to Hugh B. Fleming the balance of \$15,000. These securities were delivered to Frederick N. Mills, and the real estate was conveyed to him by Hugh B. Fleming in view of anticipated financial difficulties and for the purpose of placing it beyond the reach of his creditors. Subsequently, on or about the fifteenth day of August, 1887, Hugh B. Fleming, who was a resident of Erie, Pa., came to Chicago and had an accounting with Frederick N. Mills, and it was agreed that the amount due to Fleming on account of securities which Mills was unable to return,

was \$15,275, and Fleming demanded payment or security from Frederick N. Mills. The subject was brought to the attention of Eliza A. Mills, the mother of Frederick N. Mills, and she gave her three notes, of \$5000 each, payable to the order of Maria L. Fleming, wife of Hugh B. Fleming, and a mortgage to Maria L. Fleming to secure the notes, upon lots 7 and 8 of the premises in question, both notes and mortgage bearing date the fifteenth day of August, 1887. Subsequently, on June 24, 1892, in consideration of \$18,000, which was intended to cover the three notes of \$5000 each secured by the mortgage above mentioned, and the note in favor of Margaret F. Layton for \$2000 secured by the trust deed above mentioned, and for accrued interest upon the \$15,000, Eliza A. Mills, the widow, executed a warranty deed to Maria L. Fleming conveying the property in question. The deed was the statutory form of warranty deed, and made no reference to the power in the will of Royal A. B. Mills.

Eliza A. Mills remained in possession of the premises in question until her death, on October 11, 1892. She never re-married, and left surviving as her only heirs-at-law and next of kin, her said children, James M. Mills, Frederick N. Mills, Jennie M. Mills and Katherine L. Mills. After the death of Mrs. Mills, Frederick N. Mills, Jennie M. Mills and Katherine L. Mills, who were living with her at that time, remained in possession of the premises in question until on or about the first day of May, 1894, when they took a lease in writing from the appellant, Hugh N. Fleming, for the premises in question for a period of one year, for a certain rental reserved in the lease. Hugh N. Fleming had inherited whatever title he had from his mother, Maria L. Fleming, who had died some time prior to May, 1894. At the expiration of said lease, on or about April 30, 1895, James M. Mills entered into possession of the property in question, except the barn thereon, and filed the bill of complaint in this case for partition, making his brothers and sisters, Hugh N.

Fleming, the appellant, and Charles Whitcomb, appellee, who was in possession of the barn, defendants. The bill claims, and appellees contend, that the execution of the mortgage of \$15,000 to Maria L. Fleming, and the subsequent deed of Eliza A. Mills to Maria L. Fleming, were without effect in law and void as against the heirs of Royal A. B. Mills, because they were not given for the support and maintenance of Mrs. Mills and her family, and were not authorized by the power in the will; and the appellees, Jennie M. Mills and Katherine L. Mills, further contend that the taking of a lease from Hugh N. Fleming, under the circumstances, does not estop them from denying that Hugh N. Fleming had title to the property. On April 28, 1898, during the pendency of this suit, Frederick N. Mills died, having never married, and leaving him surviving the appellees, James M., Jennie M. and Katherine L. Mills, his only heirs-at-law.

The circuit court decreed that the mortgage bearing date the fifteenth day of August, 1887, given by Eliza A. Mills to Maria L. Fleming, and the warranty deed between the same parties dated the twenty-fourth day of June, 1892, were not given for the support and maintenance of Eliza A. Mills or her family, and were not executed in pursuance of or under the power contained in the will of Royal A. B. Mills, and were null and void as against appellees, heirs of Royal A. B. Mills, and did not operate to convey the fee of the property; that the appellant, Hugh N. Fleming, be subrogated to the rights of Margaret F. Layton or her assigns under the trust deed from Eliza A. Mills and others to David O. Strong, trustee, given to secure the indebtedness of \$2000, and that the appellees account to the appellant, Fleming, for said \$2000 and interest thereon from July 3, 1892, together with all taxes and assessments paid upon the property by Maria L. Fleming or Hugh N. Fleming, and that appellant, Hugh N. Fleming, should account to appellees, James M., Katherine L. and Jennie M. Mills, for all rents



received from the property from said Frederick N., Katherine L. and Jennie M. Mills or Charles Whitcomb, or any other person since the death of Eliza A. Mills; and that the balance found to be due to Fleming, with lawful interest thereon, should remain a lien upon the property in question until the same is paid; that the matter of accounting be referred to a master in chancery to take and state the account; that upon the death of Frederick N. Mills, appellees, James M., Jennie M. and Katherine L. Mills, were his only heirs-at-law, and each inherited one-third of all the right, title and interest of said Frederick N. Mills in the property, and that said appellees are each entitled to an undivided one-third of the premises in question in fee simple, subject to the lien for the amount due Hugh N. Fleming to be found upon the accounting, and decrees a division or partition of the premises, and that upon the filing and approval of the master's statement of account between the parties, commissioners shall be appointed by the court to make partition of the premises, in the usual form of partition decree.

WICKERSHAM & HAYNER, for appellant.

SMITH, HELMER, MOULTON & PRICE, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

As has been seen, the property in question was willed to Eliza A. Mills for life, with power to sell for the support and maintenance of herself or family. On the hearing appellees introduced James M. Mills, Frederick N. Mills and Katherine L. Mills as witnesses, for the purpose of proving that the conveyance of the premises by Eliza A. Mills to Maria L. Fleming was not made for the support and maintenance of herself or family, and it was proven by the witnesses, or some of them, that the conveyance was not made for the support and maintenance of Mrs. Mills or her family, but, on the other hand, it

was made to pay a debt due from Frederick N. Mills to Hugh B. Fleming. The appellant objected to the testimony of these witnesses, and claims that under section 2 of chapter 51 of our statutes they had no right to testify in the case. That section is as follows: "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as \* \* \* executor, administrator, heir, legatee or devisee of any deceased person, \* \* \* unless when called as a witness by such adverse party so suing or defending." Appellant claims that he was sued and defends as heir-at-law of Maria L. Fleming, and under the statute the heirs of Royal A. B. Mills were precluded from testifying against him.

When the situation of the parties in relation to the title to the property in question is fully understood it will be seen that the position of appellant cannot be maintained. Royal A. B. Mills owned the property when he died. He disposed of the property by will. The title of appellant to the property, whatever it may be, is derived from and rests upon the will. So, also, the complainant and the other heirs-at-law of Royal A. B. Mills claim and derive their title from the will. It is true that appellant claims as an heir of his mother, Mrs. Fleming; but the only title of Mrs. Fleming arose from a deed made to her by Eliza A. Mills, and Mrs. Mills' power or authority to convey rests upon the provisions of the will of Royal A. B. Mills, and hence it is that appellant, the appellees and the other heirs-at-law of Mills all claim under the will of Mills. Appellant is therefore not defending as an heir, within the meaning of the statute, and hence his objection to the evidence was properly overruled.

The question here involved is controlled by *Pigg v. Carroll*, 89 Ill. 205, and *Mueller v. Rebhan*, 94 id. 142. In the discussion of a similar question in the latter case it

is said (p. 149): "In *Pigg v. Carroll*, 89 Ill. 205, it was held that in a proceeding for partition of land between heirs and for the adjustment of matters of advancements made to some, the husband of one of the parties was a competent witness in behalf of his wife. Although the parties claimed their respective rights and sued and were sued in respect to rights held by inheritance, yet the statute could have no application to such case. The statute in this regard was intended to protect the estates of deceased persons from the assaults of strangers, and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to the relative rights of heirs or devisees as to the distribution of an estate in proceedings by which the estate itself is in no event to be reduced or impaired."

There is no effort, here, to reduce or impair the estate of Mrs. Fleming, which the appellant claims to represent. That estate is not involved in this proceeding. The estate here involved is that of Royal A. B. Mills, and that alone, and the question involved is whether the property in question passed by the deed of Mrs. Mills to Mrs. Fleming, or whether, upon the death of Mrs. Mills, the property passed to the heirs of Mills, as provided in his will. If the property involved was not conveyed by Mrs. Mills for the support or maintenance of herself or family, that fact appellees had a right to prove by complainant in the bill and the other heirs-at-law of Royal A. B. Mills.

In regard to the validity of the conveyance from Eliza A. Mills to Maria L. Fleming but little need be said. By the terms of the will of Royal A. B. Mills a life estate was conferred upon Eliza A. Mills, with power of sale for the support and maintenance of herself or family. She was clothed with the power of sale for the purpose named, but for no other purpose whatever. The testator, who conferred the power, had the right to impose such lawful checks or conditions upon the exercise of the

power as he might deem proper, and no sale could be made without a strict compliance with the terms upon which a sale was authorized. Here appellant introduced no evidence to show that the deed was made for the purpose of raising money for the support of Mrs. Mills or her family, but, on the other hand, appellees established by the evidence that the sale was made for the purpose of paying a debt due from Frederick N. Mills to Hugh B. Fleming. As Mrs. Mills had no authority to convey for the purpose for which the deed was made, the deed may be regarded as a fraud on the devisees of the remainder in fee, as held in *Griffin v. Griffin*, 141 Ill. 373. If it had become necessary to use the property in question for the support and maintenance of the widow or her family, and she had sold and conveyed the property to raise money for that purpose, the sale might be sustained; but she had no authority to convey the property to pay a debt which one of her children had incurred in speculation, and the sale for that purpose cannot be sustained.

But while the conveyance from Mrs. Mills to Maria L. Fleming must ultimately be set aside, there is one insurmountable difficulty in the way of sustaining the present bill and granting the relief given by the decree. It appears that on the first day of May, 1894, Frederick N. Mills, Jennie M. Mills and Katherine L. Mills leased the premises in controversy of Hugh N. Fleming for the term of one year, for a certain rent specified in the lease. They occupied the premises under the lease and paid the rent. A day or two before the lease expired the lessees permitted the complainant in the bill to enter into the possession of the property. Having obtained possession from appellant's tenants, he filed this bill for partition and to set aside the deed under which appellant claims. Having obtained possession by collusion with appellant's tenants, can he, without first surrendering that possession to appellant, maintain a bill to impeach appellant's title? It is a well settled rule of law that a tenant cannot

dispute the title of his landlord. He must restore the possession to the landlord before he can assail his title. If he disclaims the title of his landlord and claims the premises adversely for himself or another, his possession from that moment becomes tortious. This principle is strictly applicable to all who succeed to the possession from or through the tenant. They occupy the same position and are held to the same responsibility. (*Fusselman v. Worthington*, 14 Ill. 135.) In *Carter v. Marshall*, 72 Ill. 609, it was held that where a party in possession of premises accepts a lease and occupies under it he is estopped to deny his landlord's title until the parties are placed in original positions; and it makes no difference that the tenant may have been in possession as the tenant of a former landlord,—he is precluded from denying the title of either. It was also said: "No dispute as to the title will be tolerated until the parties are placed in their original position." In the same case the rule is also laid down that there may be one exception to the general rule that a tenant cannot dispute the title of his landlord, and that is where the tenant has been induced by fraud, artifice or mistake to accept a lease. Here nothing of the kind is pretended, but so far as appears the lease was entered into by the parties without fraud or mistake, and the lessees were bound to surrender the possession of the property to the lessor before they could assail his title, and the complainant in the bill, having obtained the possession from the lessees, stands in no better position. After he and they have delivered up the possession of the property to the appellant, then, and not before, they will be at liberty to assail his title. *Doty v. Burdick*, 83 Ill. 473.

For the error indicated the decree of the circuit court will be reversed and the cause will be remanded.

*Reversed and remanded.*

. THOMAS SNELL

v.

ABNER TAYLOR.

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97a \*620*Opinion filed October 19, 1899—Rehearing denied December 13, 1899.*

1. EVIDENCE—*what will not sustain claim of settlement of partnership.* A finding of the court, based on conflicting evidence, that a settlement was not made between partners at a specified time, as claimed by one of them, is justified when supported by letters between the parties and entries in the firm books, subsequently to such date, inconsistent with the theory of settlement.

2. INTEREST—*when interest should not be charged on accounting between partners.* On an accounting between partners, interest should not be charged against one of them where he has not improperly used the fund or promised to pay interest or refused to account before the bill was filed, or in any way sought to delay the hearing.

*Taylor v. Snell*, 79 Ill. App. 462, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of DeWitt county; the Hon. LYMAN LACEY, Judge, presiding.

Thomas Snell, on December 9, 1875, filed his bill against Abner Taylor, in which he averred that about the year 1870 he and Abner Taylor became partners in the business of buying and selling real estate in equal shares as to profits and losses, the business to be carried on at Chicago under the name of Snell & Taylor; that the co-partnership thus formed was commenced December 31, 1870, and its business carried on at Chicago under said firm name, and has since continued; that Abner Taylor, for and in the name of the firm, purchased a certain tract of land containing twenty-seven acres in Cook county; that said tract, according to the intention with which it was purchased, was divided into lots, and, as such, sold; that Abner Taylor has sold and conveyed all of said lots, received all the moneys that have been paid on the same

by persons purchasing, and has also received all notes, bonds, securities, etc., arising out of the sale thereof, amounting to the sum of \$100,000; that Abner Taylor has ever refused, and still refuses, to account to complainant for any part of such moneys, notes, bonds, securities, etc.; that there has not been any settlement or adjustment between complainant and Taylor of said co-partnership business for six years and upwards, and that the accounts respecting the same are still open and unliquidated, and the amount of money due said co-partnership from said Taylor, individually, is very considerable, and much more than his share or proportion thereof; and praying process against Taylor, and that he be required, but not under oath, to make answer to the bill, and that the co-partnership business of Snell & Taylor may be dissolved, and that an account may be taken of all said co-partnership dealings and transactions which are open and pending between the partners, and that what thereupon shall appear to be due from Taylor to complainant may be decreed to be paid by him; and that a writ of injunction may be issued restraining Taylor from drawing, making, endorsing or negotiating any note or bill or security whatever, for or on account of or in the name of said firm, or from receiving or keeping any money, bill or security for or on account of said co-partnership funds, or from using or employing said co-partnership funds or any part thereof, and from further intermeddling with the books, papers, bills, notes, cash and security in said business, and that a proper person may be appointed by the court as a receiver, etc.

On December 9, 1875, a summons was issued out of the court on said bill, and duly served the next day on Abner Taylor. The proceeding was regularly continued, without any other orders of the court therein or answer from Taylor, until September 2, 1889, when Taylor filed a plea and answer, alleging that as to so much of the bill as seeks an account of the dealings and transactions be-

tween complainant and defendant prior to the first day of January, 1875, the defendant says that on the first day of January, 1875, complainant and defendant settled their accounts of all sums of money which defendant had before that time received either from complainant or from complainant and defendant as partners, and of all matters and things thereunto relating, or at any time before the said first day of January, 1875, being or depending between them in relation to their co-partnership dealings, and in respect of which the complainant's bill has since been filed; that complainant, after a strict examination of said account and every item and particular thereof, which the defendant avers, according to the best of his knowledge and belief, to be true and just, did approve and allow the same, and actually received from the defendant the sum of \$1000, the balance of said account, which, by said account, appeared to be justly due from the defendant, and the complainant then and there, in consideration thereof, released and discharged the defendant from any and all liability or obligation to him on account of said co-partnership dealings up to that time; and therefore defendant pleads said settlement in bar to so much of the complainant's bill as is hereinbefore particularly mentioned; and for answer to the residue of said bill, defendant says that in 1868 complainant and defendant entered into an agreement to become partners in the business of buying and selling real estate, in equal shares as to profit and loss, but denies that it was carried on in the name of Snell & Taylor, and charges it was carried on in the name of this defendant, and was limited to the purchase and sale of the lands hereinafter described, and none other; denies that he, for and in the name of Snell & Taylor, purchased a tract of land containing twenty-seven acres in Cook county, but states that he purchased it in his own name, and for his individual purposes, long before the formation of said co-partnership, and that afterwards, in the year 1868, he,



at the earnest solicitation of said Snell, allowed him to become the owner of an undivided one-half thereof, and that from that time until it was sold they owned it as partners; admits that said land was divided and subdivided into lots, known as Taylor's subdivision, and the most, if not all of it, sold; denies that he sold and conveyed all of said lots and has also received all the money that had been paid on the same, and has also received all the notes, bonds, etc., arising out of the sale of said lots, amounting to the sum of \$100,000, and avers the truth to be, the complainant sold and conveyed a large number of said lots and received the proceeds of the same, which he continues to hold and for which he refuses to account to this defendant; denies that he retained any of the money or other property belonging to the said firm, and that he has ever refused to account to the complainant for any portion of what he ever did receive for said firm, but states that on January 1, 1875, he accounted to the complainant for all the money he, the defendant, had ever received for or on account of said firm, and there was a full settlement of all their co-partnership dealings between them up to that time, each one of them receiving the full amount due him from the firm on account of all sales made to the firm by either of them at that time; that defendant conveyed to the complainant lot 21 in said subdivision; that complainant was to hold it and sell it as the property of the firm, and account to the firm for its proceeds, and defendant charges that the complainant has never accounted for said last mentioned lot or its proceeds, although, as this defendant is informed and believes, he sold the same for a large sum of money, which he still retains; defendant denies that complainant is entitled to the relief, or any part thereof, in this bill demanded, but says that this defendant is entitled to have the complainant account to him for this last mentioned lot, which he prays may be required of him to do.

Afterwards, at the August term, 1890, of the court, there was filed by the complainant a replication, denying the truthfulness of the facts stated in the plea and answer, and insisting that the facts set out in the bill were true.

At the March term, 1891, the issue joined upon the plea and answer, on the question of a settlement of the partnership business, was heard and evidence taken, and the court found that there had been no such settlement, and referred the case to the master to take testimony and state an account between Snell and Taylor. The master did take evidence and reported the same, with an account stated between the parties, to which exceptions had been made before the master by each party and overruled by him, upon which evidence and account of the master the proceeding was heard by the court, together with the exceptions made by the parties to the master's report, account and rulings thereon, and the court, on April 11, 1895, after sustaining certain exceptions upon each side and re-casting the account in accordance with its rulings on the exceptions, found that there was owing to the complainant, Snell, by the defendant, Taylor, on December 9, 1875, the sum of \$5071.96, with interest thereon from that time until the hearing, amounting to \$5693.51, making in all \$10,765.47, and decreed that Taylor pay that amount to Snell, and also that Taylor pay all the costs. Taylor prosecuted a writ of error from the Appellate Court, which partly affirmed and partly reversed the decree of the circuit court.

RICHARD A. LEMON, for appellant.

MOORE & WARNER, for appellee.

Per CURIAM: In deciding this case the Appellate Court expressed the following views:

"The evidence shows that some time in 1868 Snell and Taylor did form a co-partnership, and, as such partners,

they owned and platted into lots a tract of land in Cook county, and sold the same out to purchasers, at a profit of many thousands of dollars over its cost. Snell lived in DeWitt county, Illinois, while Taylor lived in the city of Chicago and had entire charge of the partnership business, which was conducted in Chicago in a real estate office, where the firm had employed a salesman and book-keeper by the name of Salter, who made most of the sales and kept all of the books of Snell & Taylor in this co-partnership business, and rendered to Snell quarterly statements of the condition of the firm's affairs, as shown by the books. Snell and Taylor had frequent settlements up to the time of the great Chicago fire in 1871, when all the books and papers of the firm were destroyed. After the fire Snell went to Chicago, and having with him the three last quarterly statements sent him by their clerk, he and Taylor divided considerable of the undivided proceeds of the lots sold up to that time, and a new set of firm books was then started. After that, and up to the fall of 1874, the firm continued to sell lots as before, Taylor and the clerk running the firm business in their office in Chicago, and Snell residing in Clinton but often going to Chicago. When there he would, at times, look over the business and receive from Taylor some of the proceeds of the lots that had been sold, and, after that time, the business of selling lots continued, but the evidence is conflicting as to whether Taylor sold them as an individual or partner.

"It is claimed by Taylor that the books of the firm, as kept by the clerk, show, and that the fact was, that he and Snell had a settlement of their firm matters on October 8, 1874, and then divided all the assets of the firm not before then divided, except one lot which Snell took and was to sell and account to him for one-half the proceeds thereof, which, up to the time the decree was entered, he had not done, although he had sold the lot for \$2500. Snell claims, however, that no such settlement

occurred in October, 1874, and that there was no division between him and Taylor then, as claimed. On this question of fact the evidence is conflicting. The books of the firm contain many entries, and there were in evidence letters written by Taylor to Snell after the fall of 1874, which are very inconsistent with his testimony on the question that there was a settlement and division between him and Snell in October, 1874, as he, Taylor, claimed; and Taylor's letters to Snell, written between 1874 and 1889, corroborate Snell and contradict Taylor.

"We have, at considerable pains, examined the copies of the books of Snell & Taylor, as kept by their book-keeper, Salter, and the evidence of the witness Chandler, who played the part of a go-between, as between Snell and Taylor, in an effort to effect a settlement between them in October, 1874, and which, he says, he did effect; also the testimony of the book-keeper, Salter, and that of Snell and Taylor, as it appears in the transcript of the certificate of evidence in this case, and we are, after a careful consideration thereof, satisfied that the learned chancellor who heard this case in the court below was justified therefrom in stating the account between these two partners as he did, except that he improperly charged in the account the item of \$5693.51 against Taylor, it being the interest on \$5071.96 from December 9, 1875, the date the bill was filed, until April 11, 1895, the date the decree was entered. As these parties were partners, the balance of \$5071.96 of the firm assets found to be in the hands of Taylor on an accounting ought not to bear interest in favor of his partner, Snell, unless it was shown—and it was not—that Taylor had promised to pay interest, or had improperly used, or neglected to account for, the assets of the partnership before the bill for an accounting was filed; or, after the bill was filed, by throwing obstacles in the way of collection, by some circumvention, contrivance or management of his own, which had induced the court to withhold the hearing of

the proceeding against him longer than it otherwise would have done. *Imperial Hotel Co. v. Clafin Co.* 175 Ill. 119; *Randolph v. Inman*, 172 id. 575; *Brownell v. Steere*, 128 id. 209.

"Neither the evidence nor the bill shows that, before it was filed, Snell requested or procured an accounting from Taylor of these firm funds, and, after the bill was filed, it does not appear from the record that Taylor did interpose any unwarrantable applications for delay or in any manner seek to delay a hearing, but on the contrary, the long delay between the filing of the bill and a hearing and decree was caused solely by Snell. Hence we think the item of \$5698.51, as interest, charged by the court in its decree herein, to Taylor, was erroneously so charged, and for that reason the decree will be reversed as to that much and affirmed for the residue of \$5071.96."

We concur in the views above expressed and in the foregoing conclusion reached by the Appellate Court. Accordingly the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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CLARA B. WOODRUFF *et al.*

*v.*

THE KELLYVILLE COAL COMPANY.

*Opinion filed October 16, 1899—Rehearing denied December 13, 1899.*

1. CONSTITUTIONAL LAW—*Mine Managers act of 1891 is, in part, unconstitutional.* The act of 1891, (Laws of 1891, p. 168,) entitled "An act to provide for the examination of mine managers and to regulate their employment," is unconstitutional in so far as it confers upon third persons the right to recover the penalty for its violation, (sec. 5, p. 169,) as such provision is not embraced within the title of act, as required by section 13 of article 4 of the constitution.

2. PLEADING—*constitutionality of act and sufficiency of declaration thereon may be tested by general demurrer.* The sufficiency of a declaration drawn under the provisions of a statute, as well as the constitutionality of the act, can be raised by a general demurrer.

MAGRUDER, J., dissenting.

WRIT OF ERROR to the Circuit Court of Vermilion county; the Hon. F. BOOKWALTER, Judge, presiding.

WILLIAM R. BLACKBURN, for plaintiffs in error.

W. J. CALHOUN, and H. M. STEELY, for defendant in error.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Plaintiffs in error, as the heirs of Ira B. Woodruff, (who was killed by a fall of clod, while employed in defendant's mine, on the 18th day of January, 1893,) brought their action of debt, substantially averring that the defendant is a corporation, and was on January 18, 1893, the owner, possessed of and using and operating a certain coal mine known as "Kelly's Mine No. 1;" that said mine was on that day regularly equipped for mining coal and shipping it by rail, its capacity and daily output being more than twenty-five tons; that the said company on said date willfully and wrongfully employed as its servant a certain person to superintend and manage the Kelly Mine No. 1, who was then and there known and designated as mine boss, foreman or pit boss, and who was charged with the general direction of the underground work of said mine as defendant's servant, and did not then and there hold a certificate of competency or a certificate of service as a legally qualified mine boss, foreman or pit boss, as required by the statute of the State of Illinois in reference to mines and miners; that while the said defendant was then and there willfully and wrongfully employing said unqualified person to superintend and direct the underground working of said mine, the said Ira B. Woodruff, who was then and there employed as a coal miner and engaged in working in said mine at a place under the superintendence of the said pit boss, foreman or mine boss, by a fall of clod from the roof was injured, in consequence of which he died; that he left

surviving him his mother, brother and sisters as next of kin, who, by reason of his death, were deprived of their means of support.

To the declaration a plea of the general issue was filed, which, by leave of the court, was subsequently withdrawn and a general and special demurrer filed. The demurrer was, that the said amended declaration was not sufficient in law, and for a special cause of demurrer alleged that the declaration is in debt when it should be in case. The demurrer was sustained by the circuit court. The plaintiffs stood by their declaration, and judgment was entered for the defendant. The plaintiffs sued out a writ of error to this court. The theory on which the case is brought to this court is, that the constitutionality of the act with reference to mines and mine owners was involved in the case.

The act under which this suit is brought is entitled "An act to provide for the examination of mine managers and to regulate their employment," approved June 18, 1891, in force July 1, 1891, and the sections of the act necessary to refer to, with reference to the discussion of the questions presented on this record, are the first, second and fifth, which are as follows:

"Sec. 1. That in order to secure greater efficiency in the management of coal mines and a higher standard of qualifications in those who have immediate responsibility for the health and safety of persons employed in coal mines, it shall be unlawful, except as hereinafter provided, after the first day of January, 1892, for any person to assume or attempt to discharge the duties of mine manager at any coal mine equipped for shipping coal by rail or water, or any mine whose output may be twenty-five or more tons per day, unless he shall hold such a certificate as to his qualification for that position as may be required by this act, from the State board of mine examiners: *Provided*, that the term 'mine manager' is here intended to mean any person who is charged with the

general direction of the underground work, or of both the underground and top work, of any coal mine, and who is commonly known and designated as mine boss, or foreman, or pit boss.

"Sec. 2. The certificates provided in the first section of this act may be either certificates of competency or certificates of service, and any person may acquire such certificate by appearing before the State board of examiners, appointed by the commissioners of labor for the examination and inspection of mines, and submitting to such an examination as to his competency or length of service as may be prescribed by this act and the said examiners.

"Sec. 5. After January 1, 1892, no owner, operator or agent of any mine to which this act applies shall employ any mine manager who does not hold either the certificate of competency or service herein provided for, and if any accident shall occur in any mine in which a mine manager shall be employed who has no certificate of competency or service, as required by this act, by which any miner shall be killed or injured, he or his heirs shall have right of action against such operator, owner or agent, and shall recover the full value of the damages sustained: *Provided*, that in case no suitable or satisfactory certified mine manager can be obtained by any operator at the date herein specified, such operator may place any competent man in temporary charge of his mine to act as mine manager until such time as a suitable certified manager may be found: *Provided*, that the time be not more than three months from the date aforesaid."

Section 13 of article 4 of the constitution of this State contains, *inter alia*, the following provision: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."



Whilst this act declares in its title that it is to provide for the examination of mine managers and to regulate their employment, the sections prior to section 5 of the act declare it to be unlawful to assume or attempt to discharge the duties of mine manager, where the output of the mine may be twenty-five or more tons per day, unless the person assuming to discharge such duties shall hold a certificate as to his qualifications for that position as may be required by the act, from the board of mine examiners, and defines the term "mine manager." It is then provided that the certificate provided for may be either a certificate of competency or of service, and any person may appear and submit to an examination as to his competency or length of service before the board of examiners. By section 5 above quoted, no owner, operator or agent of any mine to which this act applies shall employ any mine manager who does not hold either a certificate of competency or of service herein provided for, and the last sentence of that section provides that any violation of the provisions of the act shall be deemed a misdemeanor on the part of such owner, operator or agent, and punished accordingly. The further provision contained in section 5, that "if any accident shall occur in any mine in which a mine manager shall be employed who has no certificate, \* \* \* by which any miner shall be killed or injured, he or his heirs shall have right of action against such operator, owner or agent, and shall recover the full value of the damages sustained," seeks to provide a recovery purely as a penalty, and in no way dependent upon any question of negligence on the part of the mine manager or pit boss resulting from his incompetency; nor is it made to rest upon any act of negligence upon the part of the owner, operator or agent of the mine, other than by his employing a mine manager who does not hold such certificate as required. It is therefore an attempt on the part of the legislature to provide for a third person recovering a penalty equal to

any damage sustained by reason of any miner being killed or injured by any accident in a mine in which the mine manager or pit boss has no certificate of competency or of service. To the extent, therefore, that the act directs and requires that the mine manager shall hold a certificate of competency or of service, to be issued by a board of examiners as directed in the act, and holds him guilty of a misdemeanor for so failing and punishes him accordingly, it may be said the act provides for the examination of mine managers, and seeks to regulate their employment by declaring a violation of the statute a misdemeanor and by punishing the owner, operator or agent for employing one not holding such certificate,—and this is the only subject mentioned in the title of the act.

An attempt to give a right of action to third persons by reason of any injury or death resulting from any accident in the mine where the mine manager does not hold such certificate of competency or service, with a recovery to the extent of damages sustained thereby, is not a provision which is included in the title of the act, and has no reference to the examination of mine managers and the regulating of their employment. Any other construction of this act would provide for a double punishment,—one by reason of the last sentence of section 5, and the other by reason of the right of third persons to recover a penalty, not dependent on an injury sustained by reason of the want of a certificate of competency or service on the part of the mine manager, or by reason of any neglect of his. It may well be doubted whether such double punishment may be inflicted for the violation of the act, but we do not deem it necessary to at this time discuss that question. It is clear that nothing in the title of the act has reference to the right of third persons to recover for an injury received in a mine or damages for the death of a person in a mine, either case resulting from an accident in such mine where the mine manager holds no certificate as required by the act and where the accident in no man-

ner results by reason of the incompetency of the mine manager.

The sufficiency of the declaration under the act, as well as its unconstitutionality, could be raised by the general demurrer, and for the reason that the title of the act in no manner embraces the right of a third person to recover a penalty for its violation, we hold the act unconstitutional, so far as such right of recovery by such third person is sought to be given.

The judgment of the circuit court of Vermilion county is affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER, dissenting.

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JOHN DOLESE *et al.* v. JAMES C. McDOUGALL *et al.*  
and  
CLEVELAND STONE CO. v. JAMES C. McDOUGALL *et al.*

*Opinion filed October 16, 1899—Rehearing denied December 13, 1899.*

1. EVIDENCE—*when evidence does not show valid agreement by creditors to pro rate claims.* A valid and binding agreement between creditors and the members of an insolvent firm to pro rate the assets is not shown by evidence that the result of the creditors' meeting was not a consummated contract, but merely the partial preparation of a written agreement which was never signed.

2. APPEALS AND ERRORS—*objections to master's findings must be made below.* Objection cannot be made in the Appellate Court to a finding by the master which was not objected to, when no exception to his report was urged before the court.

3. ASSIGNMENT—*contractor's order on village is an equitable assignment of amount mentioned therein.* An order given upon a village by a contractor to a creditor for work done upon a local improvement operates as an equitable assignment to the payees of the amounts mentioned in the orders of the special assessment fund to which the contractor is entitled.

4. SAME—*what sufficient to operate as an assignment of a part of a special assessment fund.* A written order given upon a village by a contractor, and directing that its amount be charged to the contractor's account on a specified local improvement constructed by

special assessment, is sufficient to operate as an equitable assignment of a part of the special assessment fund, from which, alone, under the statute, the contractor could be paid.

5. INJUNCTION—*when technical violation of an injunction is harmless.* That warrants drawn in pursuance of orders given by a contractor upon a special assessment fund were issued in technical violation of an injunction cannot be complained of by a judgment creditor of the contractor, where those receiving the warrants were equitable owners by assignment, to the amount of their orders, of the fund, which, to that extent, could not be applied on the judgment.

*Dolese v. McDougall*, 78 Ill. App. 629, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

The firm of McDougall & Hammond was engaged in the business of contracting for street work, in which they employed labor and used materials for plumbing, grading, paving, etc. They had made a contract with the village of South Evanston for curbing, grading and paving certain of its streets, including West Lincoln avenue. In October, 1891, the firm was found to be financially unable to complete its contracts and meet its existing liabilities for labor and material. Dolese & Shepard claimed an indebtedness against it of \$15,076.93, about \$4000 of which was evidenced by its judgment note. In the latter part of October and early in November the creditors generally began to press the collection of their claims. The liabilities aggregated about \$40,000. On November 5 the creditors representing \$38,000 of that indebtedness held a meeting in the office of Dolese & Shepard, at which McDougall & Hammond were present or represented, for the purpose of bringing about an amicable adjustment of all the liabilities of the firm. Dolese & Shepard took part in that meeting. Whether or not an agreement to that effect was then consummated, binding upon those present, is one of the principal questions in the present litigation. It appears, however, that soon thereafter sev-

eral of the creditors who were present and participated in the negotiations proceeded to secure the payment of their debts without reference to any action taken at the creditors' meeting.

On November 14 Dolese & Shepard caused a judgment to be entered on their note for \$4017, and on the 16th, execution thereon having been returned *nulla bona*, they filed the original bill herein, which in its principal allegations and prayer for relief is an ordinary creditor's bill, asking that McDougall & Hammond be required to answer under oath and make discovery in the usual form of such bills, for the appointment of a receiver, and for an injunction. In addition to McDougall & Hammond, Peck Bros. & Co., E. W. Blatchford & Co., the L. Wolff Manufacturing Company, Oliver D. Peck, Albert D. Saunders, etc., were made defendants. The charge in the bill is, that the last named defendants had wrongfully obtained certain of the assets of the firm, and Olof Vider & Co. had, by collusion with McDougall and the board of trustees of the village of South Evanston, fraudulently obtained from the village its warrants, amounting to \$5200, for money due from it to McDougall & Hammond. The contract of the latter with South Evanston is set forth by the bill, with the allegation that on October 24, 1891, the firm assigned to the complainants all their right, title and interest in and to all moneys, warrants, vouchers, credits or other benefits then due or thereafter to become due from said village of South Evanston by virtue of said contracts and the performance thereof, and did make, constitute and appoint Shepard their attorney to collect from the village officers all such moneys, etc., and to receipt for the same, but that the village, by its president and board of trustees, wrongfully refused to recognize such assignment and power of attorney, and threatened to pay over the money, warrants, etc., included in the assignment, to McDougall & Hammond, or other persons on their behalf, to the injury of

complainants, and alleging that the appointment of a receiver, and an injunction, are necessary to the protection of the complainants' rights.

Immediately upon the filing of the bill a receiver was appointed and a writ of injunction issued and served on the village authorities. Subsequently the appellant the Cleveland Stone Company was permitted to become a party defendant, and, after answer, filed a cross-bill, in which it alleged that at the creditors' meeting of November 5 a valid and binding agreement was entered into by McDougall & Hammond and their creditors then present, that the latter should share *pro rata* in all the assets of the firm, and prayed the enforcement of such agreement. Appellees Frieding & Johnson were allowed to file an intervening petition, setting up that there was due them from the firm \$974, for which they had received an order on the village of South Evanston, which had been accepted by it, but payment thereof refused on account of the writ of injunction issued on the original bill.

Issues were formed on the bill, cross-bill and intervening petition, and the cause referred to a master to take proofs and report his conclusions. He found and reported that at the creditors' meeting of November 5, the firm and its creditors made a valid agreement for a *pro rata* payment of the debts of the firm out of its assets, and that the subsequent action of certain of the creditors contrary to that agreement was fraudulent, illegal and void; that such creditors should be required to account for the amounts received by them, and a decree entered carrying into effect said agreement.

The court dismissed the cross-bill of the Cleveland Stone Company, and dismissed the original bill as to Peck Bros. & Co., E. W. Blatchford & Co. and the L. Wolf Manufacturing Company, and found in favor of the claims of Vider & Co., Frieding & Johnson, Edward Johnson and T. B. Blanchard, and, their claims being payable out of moneys raised by a special assessment of the village of

South Evanston, decreed that the village of Evanston, as the successor of the village of South Evanston, should pay the claims if sufficient had been collected, but if not, then *pro rata* so far as the amount collected on the special assessment would permit. It also found and decreed that the issuing of the warrants to the above named parties was not a violation of the injunction; that the title to the fund on which the warrants were drawn had passed to the said parties, respectively, before the warrants were issued, etc. This appeal is by the Cleveland Stone Company and the complainants in the original bill.

CUSTER, GODDARD & GRIFFIN, for appellants Dolese & Shepard.

JOHN S. COOPER, for appellant the Cleveland Stone Company.

ALEXANDER CLARK, LEE, LEE & SCHUCHARDT, GEO. S. BAKER, and CRAFTS & STEVENS, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

If it could be held that there was a valid agreement entered into by the parties at the meeting of November 5, as alleged in the cross-bill, that conclusion would dispose of all issues made on the original bill, hence that branch of the case naturally arises first. While the master reported to the circuit court that the evidence established such an agreement, the court, on exceptions and objections to his report, overruled the finding and dismissed the cross-bill, and that decision has been affirmed by the Appellate Court, both holding that the evidence on that subject failed to prove that the alleged agreement was consummated by the parties, McDougall & Hammond and their creditors. To carry out such a contract would, we think, under all the circumstances of the case, be equitable and just as to the creditors, and there is therefore a natural inclination to do so. We are, however, unable

to find in the record sufficient proof upon which to found such a decision. The only theory upon which the alleged agreement could be given effect would be, that the action of McDougall & Hammond, and their creditors, at that meeting, amounted to an assignment of the assets of the firm for the benefit of all their creditors. It is not claimed that Edward Johnson, one of the creditors, agreed to the proposition to pro rate the assets, nor does the proof show that McDougall so consented. As shown by the opinion of the Appellate Court, (ADAMS, J.,) the result of the meeting was not a consummated contract, but merely a preliminary arrangement for the drafting and circulation of a written agreement, which, though partially written up, was never signed. It is therefore impossible to ascertain just what the real action of the meeting was. The cross-bill being based solely upon the validity and binding force of the alleged agreement, and the proof failing to sustain that agreement, the order of the circuit court dismissing it at the cost of the complainants was properly affirmed by the Appellate Court.

The appellants Dolese & Shepard, complainants in the original bill, insist that the circuit court erred in refusing to enforce the alleged assignment by McDougall & Hammond to them of October 24, 1891. It was held below that they had waived that assignment by participating in the creditors' meeting of November 5. It had been so found by the master, and no objection to that finding was made by the complainants nor exception to his report urged before the court. We think the Appellate Court properly held that it was too late to make the objection there. (*Hurd v. Goodrich*, 59 Ill. 450; *Pennell v. Lamar Ins. Co.* 73 id. 303; *Jewell v. Rock River Paper Co.* 101 id. 57; *Medsker v. Bonebrake*, 108 U. S. 66.) This sufficiently disposes of the contention without reference to the question whether the right to insist upon that assignment was waived by the conduct of the complainants prior to the filing of their bill, though we think there is force in the



reasoning of the Appellate Court in its opinion in support of the conclusion that there was such waiver.

These appellants also insist that the circuit court erred in sustaining the claims of Olof Vider & Co. and Frieding & Johnson, as against them. McDougall, of the firm of McDougall & Hammond, had given these parties orders on the village of South Evanston on November 14, 1891, to the former for \$4619.72 and to the latter for \$974, this order specifying that it was "for work done on said special assessment for us." The Appellate Court, we think, properly disposed of this assignment of error, as follows:

"It is not questioned that Vider & Co. and Frieding & Johnson furnished to McDougall & Hammond labor and material for the improvement of West Lincoln avenue, nor is the correctness of the amounts claimed by them, respectively, questioned; but it is objected that warrants were drawn, in pursuance of the orders, in violation of the injunction, and that the order payable to Olof Vider & Co. did not operate as an assignment of any part of the special assessment fund levied for the improvement of West Lincoln avenue. We do not understand that complainants' solicitor questions the power of McDougall to assign the claims of the firm in payment of the firm debts, nor do we think his power in that regard can be successfully denied. (*Hanchett v. Gardner*, 138 Ill. 571.) The money raised by the special assessment levied by the village of South Evanston for the improvement of West Lincoln avenue was due to McDougall & Hammond, the contractors, for the making of the improvement. This is not controverted, but is impliedly admitted. The giving the orders operated as an equitable assignment to the payees of the amounts mentioned in the orders, respectively, of the special assessment fund. *Savage v. Gregg*, 150 Ill. 161; *Donk v. Alexander*, 117 id. 330; *Morgan County v. Thomas*, 76 id. 120; *Morris v. Cheney*, 51 id. 451; *Chicago Title and Trust Co. v. Smith*, 158 id. 417.

"Complainants' counsel object that the order in favor of Olof Vider & Co. did not operate as an assignment of any part of the special assessment fund, for the reason that it does not expressly direct the amount of the order to be paid out of that fund; that the words of the order, 'and charge the same to our acc't. on West Lincoln av.,' are not equivalent to a direction to pay from the proceeds of the West Lincoln avenue assessment. The cases cited by counsel in support of this proposition all relate to orders in which the drawers and drawees were private persons or private corporations, there being no legal limitation on the application of the fund subject to their control, and in this respect they are distinguishable from and inapplicable to the present case. The money due to McDougall & Hammond from the village was for work and labor performed and material furnished for the improvement of West Lincoln avenue in pursuance of a contract between them and the village, and the contract price for the improvement was to be paid for from the proceeds of a special assessment levied by the village.

"When an ordinance of a city or village provides for the making of a local improvement, the ordinance must prescribe 'whether the same shall be made by special assessment, or by special taxation of contiguous property, or general taxation, or both,' (Starr & Cur. Stat. chap. 24, par. 118,) and the improvement cannot be made in any other than the prescribed mode. It is further provided that 'all persons taking any contracts with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collection of the special assessments made for the work contracted for.' (Starr & Cur. Stat. chap. 24, par. 165.) The orders are evidence that McDougall & Hammond so agreed. The treasurer is required to keep a separate account of each fund and the debits and credits pertaining thereto, (Id. par. 94,) and no fund can legally be expended for any purpose

other than that for which it was appropriated. (Id. pars. 90, 91, 92.) In the case of a special assessment for a local improvement, and if an amount is collected in excess of the cost of the improvement, the excess is to be refunded ratably to the persons by whom the assessment shall have been paid. (Id. par. 65.)

"It is manifest from these provisions that a contractor for an improvement to be made by special assessment can be paid only from the proceeds of the special assessment. The account of the fund to be kept by the treasurer consists of charges to the fund of money paid into the treasury on account of it and credits of warrants drawn against it. The contractor's account with the village necessarily consists of credits for work done on the improvement, and debits for warrants issued corresponding with such credits. Therefore, the direction in the order in favor of Vider & Co., 'charge the same to our acc't. of West Lincoln av.,' was, in effect, a direction to issue a warrant or warrants for the amount of the order on the special assessment fund for the improvement of that avenue. The order could be complied with only in that way.

"It is further contended by complainants' solicitors, that the warrants were issued to Vider & Co. and Frieding & Johnson in violation of the injunction. The orders, as before stated, were delivered to the payees the day of their date, viz., November 14, 1891. The Vider & Co. order was presented to the president of the board of trustees of the village the same day. The Frieding & Johnson order was drafted by W. S. Gates, a member of the board of trustees of the village, chairman of the finance committee of the board and temporarily in charge of the streets, and was then signed 'McDougall & Hammond' by McDougall. By order of the president of the board, warrants were drawn in favor of Vider & Co. and Frieding & Johnson for the amounts specified in the orders and were duly signed. On the evening of November 16, 1891, after the service of the writ of injunction, Mr. Gates re-

ported to the board, then in regular session, the receipt of the orders and what had been done in regard to them, and the board approved the report and directed payment to be made to Vider & Co. and Frieding & Johnson. After such approval, and while the board was still in session, the writ of injunction was read by the village clerk. November 17, 1891, warrants were delivered to Vider & Co. for the amount of the order. The warrant in favor of Frieding & Johnson was tendered by Mr. Gates to Frieding after the board adjourned, but Frieding told Mr. Gates that they wanted the cash, and requested him to keep the warrant and have it discounted for them. Gates subsequently tore off the signature and returned the warrant to the village clerk. The court found, as heretofore stated, that the issuing of the warrants was not a violation of the injunction, for the reason that Olof Vider & Co. and Frieding & Johnson were, by virtue of the orders of November 14, 1891, the equitable owners of amounts of the special assessment equal to the amounts of the orders. We are not prepared to say that this finding of the court is erroneous, but, even conceding that there was a technical violation of the injunction, we can not perceive how the complainants could be prejudiced thereby, inasmuch as Vider & Co. and Frieding & Johnson, being the equitable owners of the fund to the extent of their orders, the fund, to that extent, could not be applied in satisfaction of complainants' judgment."

The claims of other creditors are not questioned.

Other questions raised and discussed by counsel in their argument have been considered, but we do not regard any of them as of controlling importance.

The record is very voluminous, and seems to have been very carefully considered by the Appellate Court, and, in our opinion, disposed of in conformity to the law and facts of the case. Its judgment will accordingly be affirmed.

*Judgment affirmed.*

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK  
v.  
MINNIE E. WEISE.

*Opinion filed October 13, 1899—Rehearing denied December 13, 1899.*

1. APPEALS AND ERRORS—*when giving of instruction as to burden of proof is reversible error.* In an action upon an accident policy, where the defense is that the insured committed suicide, an instruction that the burden of proof is upon the defendant is reversible error, where it is indispensable to the right of recovery to show, by preponderance of evidence, that the assured came to his death through accidental means, as alleged.

2. EVIDENCE—*burden in suit on accident policy is on plaintiff.* The burden resting upon the plaintiff in an action upon an accident policy to establish, by a preponderance of the whole evidence, that the assured met accidental death, is not shifted to the defendant company by pleas raising the defense of a stipulation in the policy that if the deceased committed suicide while insane only premiums paid should be recovered, so as to require the defense to be proved by a preponderance of the evidence.

*Fidelity and Casualty Co. v. Weise*, 80 Ill. App. 499, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN C. GARVER, Judge, presiding.

JOHN A. POST, and O. W. DYNES, for appellant.

HARBERT, CURRAN & HARBERT, and DAVID J. WILE, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The circuit court of Cook county awarded appellee judgment against the appellant company as beneficiary under an accident policy insuring her husband, Simon Weise, against injury or death by accidental means. This is an appeal from the judgment of the Appellate Court affirming that of the circuit court.

The policy insured said Simon Weise, husband of the appellee, for her benefit in case of his death, "against

bodily injuries sustained through external, violent and accidental means," and contained also the following condition: "In case of injuries, fatal or otherwise, wantonly inflicted upon himself by the assured, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, (\$37.50,) the same being agreed upon as in full liquidation of all claims under this policy." The declaration as amended in terms alleged the said Simon Weise "suffered bodily injuries sustained through external, violent and accidental means, from which his death resulted." The general issue and several special pleas were filed to the original declaration. The substance of one of the special pleas was that the deceased wantonly took his own life, and of another that he committed suicide while insane, and both invoked the stipulation of the policy that only premiums paid should be recovered.

It appeared said Simon Weise resided in Chicago, near the shore of Lake Michigan; that he left his home before breakfast on the morning of the fifth day of July, 1893; that his dead body was found about ten or eleven o'clock in the forenoon of the same day, face downward, in the waters of the lake, which stood to the depth of about four feet between the breakwater and the shore line, near the foot of Fortieth street, in Chicago; that a bullet wound was found in the forehead, the ball having pierced the skull and penetrated the brain; that there was neither mark of burning of the skin nor stain of powder-mark on his person, and no weapon was found near the water or on the shore; that his coat and hat had been removed and were found on the stones of which the breakwater was in part composed, the coat having been laid down on the stones and the hat placed on the coat; that there were no marks of violence on the body other than the bullet wound, and no indications a struggle had taken place; that the place where the body and the coat and hat were found was remote from any regular thor-

oughfare; that the deceased had failed in business, and his affairs were placed in the hands of an assignee less than two months before his death. There was evidence tending to show he was despondent, had acted "queerly," and was impressed with the delusion he was being persecuted by his assignee. He was under medical treatment, and had the night before his death taken a nerve sedative to give him rest, he being unable to go to sleep naturally; that the verdict of the coroner's jury was that he committed suicide while temporarily insane.

The court instructed the jury that the claim the assured committed suicide was an affirmative defense; that the law cast upon the appellant company the burden of proving it, and that it "must prove" it by "evidence, facts and circumstances" outweighing the evidence of plaintiff (appellee) upon the point. In this we think the court erred. It was essential to the right of appellee to recover it should appear, by the preponderance of the evidence, the assured came to his death through external, violent and accidental means. Self-destruction is not classed as an accident except it appears the suicide was unconscious of the act or of the physical effect thereof, or was driven to the commission of the deed by an insane impulse which he had not the power to resist. (*Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408; *Accident Ins. Co. v. Crandall*, U. S. Sup. Ct. 1887.) The position of appellee during the trial was, the assured was not insane and did not commit suicide, and she produced testimony in support of that position, and such is the attitude of her counsel in this court. If he committed suicide while sane his death could not be deemed accidental. It was not enough to justify a judgment to show the assured was dead, but it was essential to the appellee's right to recover the amount of the indemnity provided by the policy, as she sought to do by her declaration, it should be proven his death was brought about by accidental means. The presumption of the law is that all men are sane and possessed of the love

of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death. This presumption, in the absence of countervailing proof, may be sufficient, within itself, to establish *prima facie* that death occurred otherwise than by self-destruction, and to cast upon the defendant company the burden of producing evidence on the point; but the existence of the presumption had no efficacy to change the rule that the obligation of proving any fact lies upon the party who asserts the affirmative of the issue. In *North Chicago Street Railway Co. v. Lewis*, 138 Ill. 9, we said: "There may be evidence which, standing by itself, establishes a certain state of facts; but the evidence does not preponderate in favor of any given state of facts unless it is sufficient to outweigh all testimony introduced in opposition thereto."

If it be conceded the presumption in the case at bar was sufficient to establish, *prima facie*, that the deceased came to his death by accident, still it was competent for the appellant company, under its plea of the general issue, to combat this point and introduce any testimony which tended to show the death of the assured was not the result of accidental causes, and it was entitled to the benefit of any and all testimony produced on behalf of the plaintiff which had the like tendency. There was testimony having weight in favor of and against the position of the plaintiff (appellee) that death occurred by accident. The plaintiff was entitled to the benefit of the presumption the assured did not take his own life. The presumption was not conclusive, but rebuttable. The question to be determined by the jury, from the consideration of all the evidence, (the plaintiff being given the benefit of the presumption referred to,) was, at the close of the testimony as it was at the beginning, did the assured come to his death through accidental means. The appellee asserted the affirmative of this proposition, and it was indispensable to her right to recover under her



declaration her position should be supported by a preponderance of the evidence. (1 Greenleaf on Evidence,—15th ed.—sec. 74, note “a.”) The instruction incorrectly cast the *onus probandi* upon the appellant. The case, upon the facts, demanded the jury should have been accurately advised as to the *quantum* of evidence required to be produced by the plaintiff. The error is, therefore, reversible in character.

It is contended by appellant the order of the court permitting the declaration to be amended, wherein the state of the pleading to the amended declaration is recited, left the general issue the only plea in the cause. The determination of this question has no material bearing upon the question upon whom rested the burden of proof upon the issue referred to in the instructions. The purpose of these special pleas was to enforce the stipulation that if the death of an assured should be occasioned by his own wanton act while insane, only premiums paid should be recovered. The plaintiff in her declaration sought to recover the indemnity named in the policy—not the return of the premiums. The issue raised by her declaration, and the plea of general issue filed thereto, was as to the right of the plaintiff to recover the indemnity of the policy. In order she might prevail on that issue it was necessary it should appear, from a preponderance of the evidence, the assured came to his death through accidental means. The stipulations in the policy that she should be entitled to the sum paid for premiums in the event the assured should come to his death by other than accidental means had no effect to relieve the plaintiff of the burden of establishing her right to recover the indemnity provided by the policy by a preponderance of the evidence.

The judgment of the Appellate Court and that of the circuit court are reversed, and the cause is remanded to the circuit court for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

TERRE HAUTE AND INDIANAPOLIS RAILROAD CO. *et al.*

182 501  
p182 550

v.

PEORIA AND PEKIN UNION RAILWAY COMPANY.

*Opinion filed October 19, 1899—Rehearing denied December 8, 1899.*

1. **PLEADING**—*when the plea of non damnificatus is not a good defense in debt.* A general plea of *non damnificatus* is not good in debt as against a declaration based upon the breach of a covenant to pay specified sums of money, although the covenant may have been given by way of indemnity only.

2. **APPEALS AND ERRORS**—*when appeal bond is not improperly conditioned.* A bond given on appeal from an order dissolving an injunction restraining a terminal railroad company from excluding the appellant company from the use of terminal facilities is, where the injunction is continued at the appellant's request pending appeal, properly conditioned for payment of the rent which the appellant company had been notified, before entering into possession, it would be required to pay, where the controversy is whether such rent is unjust and a discrimination against the appellant.

3. **RES JUDICATA**—*what is not an available defense in suit on appeal bond.* In an action on a bond given on appeal from an order dissolving an injunction, matter which goes to the merits of the injunction suit and might have been litigated in it is not an available defense, being *res judicata*.

4. **INSTRUCTIONS**—*instruction concerning matters set up in bad plea is properly refused.* An instruction concerning matters sought to be set out in defense in pleas to which demurrers have been sustained is properly refused.

*T. H. & I. R. R. Co. v. P. & P. U. Ry. Co.* 81 Ill. App. 435, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

JOHN G. WILLIAMS, (PAGE, WEAD & ROSS, and T. J. GOLDEN, of counsel,) for appellants.

STEVENS, HORTON & ABBOTT, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The circuit court of Peoria county entered a decree dissolving an injunction, granted at the instance of the appellant company, restraining the appellee company from excluding the appellant company from the use of certain tracks, switches and terminal facilities at the city of Peoria. The appellant company, in compliance with an order granting an appeal from such decree to the Appellate Court for the Second District and continuing the injunction in force pending such appeal, together with the other appellants as sureties, executed a bond conditioned as follows:

"Now, if said Terre Haute and Indianapolis Railroad Company shall duly prosecute said appeal, and shall, moreover, pay all costs rendered and to be rendered against it, and shall pay to said Peoria and Pekin Union Railway Company all damages sustained by it by the continuance in force of said injunction, and shall also pay to said Peoria and Pekin Union Railway Company the sum of \$1875 per month for each month from October 1, 1892, to the date of the filing in said circuit court of the decree dissolving said injunction, and for each and every month from said last named date during the pendency of said appeal, less such credits as said Terre Haute and Indianapolis Railroad Company may be entitled to by reason of payments made on said sum, (the said sum of \$1875 per month referred to being the rental demanded by plaintiff as a fixed charge, as in defendant's answer stated,) in case said decree appealed from shall be affirmed in said Appellate Court, then the above obligation to be null and void, otherwise to remain in full force and virtue."

The decree was affirmed by the Appellate Court, and the judgment of affirmance was, on a further appeal by the appellant company, affirmed by this court. (*Terre Haute and Indianapolis Railroad Co. v. Peoria and Pekin Union Railway Co.* 167 Ill. 296.) The facts recited in the opinion

rendered in the case by this court, and in the statement of the case preceding the opinion, are the same as are disclosed in this record and need not be reiterated here. This is an appeal from the judgment of the Appellate Court for the Second District, affirming the judgment entered by the circuit court of Peoria county against appellants, in favor of appellee company, in an action in debt brought to recover on the said appeal bond. The rulings of the trial court that pleas numbered 3, 6 and 7 were obnoxious to demurrer, and in refusing instructions numbered 1, 7, 8 and 9 asked by appellants, are assigned as for error.

Plea number 3 was a general plea of *non damnificatus*. Such a plea is good only when the condition of the covenant is, in general terms, to indemnify and save harmless. When, as here, the covenant is for the payment of specified sums of money, such a plea is not good as against a declaration which assigns as for a breach of the covenant the failure to pay the specified sums of money. (3 Ency. of Pl. & Pr. 663.) And the rule is the same though it appear the covenant was given by way of indemnity only. *Holmes v. Rhodes*, 1 B. & B. 638.

The sixth and seventh pleas do not materially differ. The allegations of each, in substance, are, the appellant company, prior to the institution of the suit in the circuit court for the injunction, had succeeded to the rights of one Genis under the contract between said Genis, as receiver of the Illinois Midland Railroad Company, and the appellee company, whereby the said Genis (and the said appellant company, as successor to the rights of said Genis,) became entitled to the use of said tracks, switches and terminal facilities upon the payment of an annual rental in the sum of \$13,000, being \$1083.33 per month instead of the sum of \$1875 per month specified to be paid for such use by the conditions of the said bond; that said appellant company has paid to the appellee company an amount equal to \$1083.33 per month for the

period specified in the bond; that the bond which the circuit court was authorized to require in order the appellant company might perfect an appeal from the decree dissolving the injunction to the Appellate Court and to continue such injunction in force pending such appeal, was a bond of indemnity only, and that the said circuit court was without legal warrant or authority to require such bond to be conditioned for the payment of the said sum of \$1875 per month.

The seventh plea set forth with more particularity the averments of the bill filed by appellant company for the injunction, and that such averments, in substance, were, the appellee company was a corporation formed for the purpose of establishing and maintaining a union station for passenger and freight depots, under the act of the General Assembly approved April 7, 1875, entitled "An act authorizing the formation of union depots and stations," etc., (3 Starr & Curtis' Stat. 1896, p. 3251,) and averred the demand of the appellee company that the appellant company should pay the sum of \$1875 per month as rental for the tracks and terminal facilities was unreasonable and unjust and a discrimination against the appellant company, and as such was in violation of section 6 of the said act. It appeared from the plea the bill alleged no claim of right in the appellant company under the Genis contract, but relied wholly upon the position the appellee company should be deemed a union depot company under the before mentioned act, and that the said sum of \$1875 was an excessive rental and an unjust discrimination against the appellant company. The plea averred the chancellor determined the contention against the appellant company, and dissolved the injunction which had been issued restraining the appellee company from excluding the appellant company from the use and occupancy of said tracks, switches and terminal facilities.

The averments of the pleas with reference to the alleged right of the appellant company to be regarded as

successor to the said receiver, Genis, and, as such, entitled, under the contract held by such receiver, to use and occupy the tracks and terminal facilities at the rental of \$1083.33 per month, did not present a defense to the action. If true, the facts disclosed by the averments of the pleas existed prior to the filing of the bill for the injunction, were known to the appellant company at that time, and constituted a cause or reason for the relief prayed for in the bill for injunction. It was the duty of the appellant company, if it desired to accept the Genis contract, to have brought forward the same in the bill for an injunction, assumed the burden of that contract, and had its rights, if any, thereunder determined in that controversy. It does not appear from the averments of the pleas any circumstances of fraud, accident or mistake intervened to prevent the presentation of such cause or reason, or that the appellant company was then ready and willing to accept the burdens of the Genis contract. In truth, as was well said in the opinion rendered by the Appellate Court, the position of the appellant company in its bill was antagonistic to the Genis contract and a virtual repudiation thereof. A second bill for an injunction would not be entertained on the theory the appellant company was possessed of right to occupy and use the tracks and terminal facilities in virtue of the Genis contract, for the reason the decree entered by the court in the injunction case is a bar to a second bill for an injunction for any cause that existed prior to the first bill, if known to the complainant and not set up in that bill. (*Ruegger v. Indianapolis and St. Louis Railroad Co.* 103 Ill. 449; *Bailey v. Bailey*, 115 id. 551; 2 High on Injunctions, sec. 1586; 1 VanFleet on Former Adjudications, p. 310; *Bank of United States v. Schultz*, 30 Ohio, 61; 21 Am. & Eng. Ency. of Law, p. 220.) The decree must be accepted as an estoppel or bar of the alleged right of the appellant company to occupy the tracks, etc., of the appellee company under and by virtue of the Genis contract, for the

reason that ground for the injunction might and should have been presented in the bill and adjudicated in that proceeding. It is to be deemed as adjudicated and determined adversely to the pleader. The pleas, therefore, proposed to re-open and re-litigate that which was *res judicata*. "In an action upon an injunction bond after dissolution, matters which go to the merits of the injunction suit are not properly admissible as a defense to the action." (High on Injunctions,—3d ed.—sec. 1652.) "Matters which go to the merits of the injunction suit are assumed to have been adjudicated in such suit, and are not admissible in defense in an action on an injunction bond." (*Sipe v. Holloway*, 62 Ind. 4.) The pleas were correctly regarded as obnoxious to the demurrers.

Counsel for appellants do not, in their briefs, refer to the alleged erroneous ruling of the court in passing upon instructions. Such objections may be deemed waived. Furthermore, the instructions referred to directed the jury as to matter sought to be set out in defense in the pleas to which demurrers were sustained, and for that reason the instructions were properly denied.

We think it was entirely competent for the chancellor to require the bond in suit to be conditioned for the payment of said monthly sum of \$1875. A chancellor would not be justified in requiring such bonds to be conditioned for the payment of sums of money in the way of arbitrary exactions or mere penalties for the privilege of taking an appeal or having the injunction continued in force. But here it appeared to the chancellor, from the proof, the appellant company was notified by the appellee company, before beginning to use the tracks, switches and terminal facilities, it would not be permitted to occupy and use the same unless it paid rental therefor at the rate of \$1875 per month, and that it was arranged, as a temporary adjustment, that the appellant company might enter upon the use of the facilities, etc., and have reasonable time in which to investigate as to the contro-

versies, and should, in the meantime, pay at the monthly rate of \$1083.33, but that such occupancy and use of the property, and the payments at the rate named, should not prejudice the right of the appellee company to demand and recover the larger monthly payment; that under the arrangement the appellant company entered into possession of the property in October, 1892; that the negotiations between the companies failed to result in an amicable settlement, and the appellee company, on the 19th day of March, 1894, notified the appellant company it would be excluded from further use of the property on the 20th day of April, 1894, unless it paid rental, during the time it had occupied and used the facilities, at the rate of \$1875 per month and effected a permanent arrangement for the further use of the property. The appellant company thereupon filed the bill in chancery, and obtained a temporary injunction restraining the appellee company from excluding it from the use of the property. Upon a hearing it was found the equity of the matter was not with the appellant company and that the injunction should be dissolved. The appellant company desired to appeal the cause and to have the injunction continued in force until the courts of review could investigate the controversy. In such state of case it was entirely competent to require the appellant company to give bond and security to pay the rental which it had been notified before entering into the property it would be required to pay, as a condition on which an order would be entered continuing the injunction in force during the time necessary for the disposition of the cause in the court of review. These conditions were fully within the authority and power of the chancellor under section 22 of chapter 69 of the Revised Statutes, entitled "Injunctions," and section 68 of chapter 110, entitled "Practice," and it was proper to incorporate them in the bond required to be given to perfect the appeal, as the effect of the appeal was to continue the injunction in force, and thereby to



enable the appellant company to continue in the occupancy and use of the tracks and facilities until the appeal could be decided.

We find the record free from error. The judgment is affirmed.

*Judgment affirmed.*

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UBBO A. UBBEN

v.

WILLIAM H. BINNIAN.

*Opinion filed October 25, 1899—Rehearing denied December 13, 1899.*

CONTRACTS—a contract construed as not being an illegal option. An agreement by a seller of stock to buy it back in five years and pay therefor the purchase price, with interest, less dividends declared, supplemented by the purchaser's agreement not to dispose of the stock without first giving the seller an opportunity to buy it upon the terms offered by others, is not a void gambling contract under section 130 of the Criminal Code. (*Wolf v. National Bank of Illinois*, 178 Ill. 85, followed.)

*Ubben v. Binnian*, 78 Ill. App. 330, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Tazewell county; the Hon. T. M. SHAW, Judge, presiding.

This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Tazewell county for costs and in bar of an action brought by the appellant, Ubbo A. Ubben, against appellee, William H. Binnian.

The amended declaration contained four special counts and the common counts. The first count alleged, in substance, that the defendant, Binnian, and one Stone, since deceased, who were then, respectively, the secretary and president of the Acme Harvester Company, for

the consideration of \$10,000 then advanced to them by the plaintiff, Ubben, issued to him a certain certificate of one hundred shares, of \$100 each, of the capital stock of said company, and as a part of the same transaction and for the same consideration made and endorsed on the back of said certificate, and delivered to him, an agreement in writing, as follows:

"PEORIA, Jan. 4, 1892.

"We hereby agree that five years after date we will buy back from Ubbo A. Ubben the within one hundred shares of Acme Harvester stock, paying for same \$10,000, and six per cent interest from date, after deducting any and all dividends that may be made upon same within that time.

W. E. STONE,  
W. H. BINNIAN.

"I hereby agree not to sell said within shares of Acme Harvester Company stock without first giving W. E. Stone and W. H. Binnian an opportunity to buy at same terms offered to me by others.

UBBO A. UBBEN."

And further alleged that the plaintiff received said certificate of stock and said contract for said consideration of \$10,000, and did not thereafter sell said stock without first giving said Binnian and Stone an opportunity to buy at the terms offered by others; that Stone died testate, and letters testamentary were issued to his executrix, and that plaintiff tendered said stock to her and to Binnian, according to the terms of the agreement, but that they, and each of them, refused to receive and pay for the same, whereby they became liable, etc., and being so liable, the defendant, Binnian, in consideration thereof, promised the plaintiff to pay him, etc. The second count did not set out the contract in *hæc verba*, but alleged that Binnian and Stone bargained for and bought of the plaintiff, and the plaintiff sold to them, said stock, to be delivered in five years, stating the terms of the contract of sale as one of bargain and sale, and thereafter the count proceeded in substantially the same language as did the first. The third count alleged that

Binnian and Stone were jointly and severally indebted to the plaintiff in the sum of \$10,000 for money advanced to them, and that for the purpose of securing the payment of said indebtedness said certificate of stock, and said agreement made and endorsed thereon, (setting out the same in *hæc verba*,) were made and delivered to him as such security. The fourth count was upon the contract, substantially as the first, except that it alleged that the plaintiff received said certificate of stock and said agreement for the purpose of transferring the title to said certificate to Binnian and Stone, for the consideration of said sum of \$10,000, five years after January 4, 1892, together with six per cent interest per annum on said sum, less any dividends received upon said stock, and that at the time of issuing said stock it did not have, and has not since had, any marketable value or quotation in the public market at any place, and that the time for performance of the contract was not fixed for the purpose of speculating upon the rise or fall in the value of said stock, and there was no intention or agreement that said contract should be performed by any settlement or adjustment of differences between the market and the contract price, but that said contract was made in good faith, for the purpose of selling said stock to said Binnian and Stone.

The circuit court sustained defendant Binnian's demurrer to the first, third and fourth counts and overruled it as to the second. The plaintiff abode by his first, third and fourth counts. The general issue was pleaded to the second count and to the common counts. The defendant also pleaded to the second count that the contract therein mentioned was the same contract set up in the other special counts, and that the same constituted an option, and was in violation of the statute and was null and void. To this plea the plaintiff replied in substantially the same terms as set forth in the third count, alleging that Binnian and Stone were indebted to him, and alleging the

pledge of the stock as security therefor. Defendant's demurrer was sustained to this replication and the plaintiff refused to plead over. A jury was empaneled to try the issues of fact made under the common counts and on the first plea to the second count, but after the plaintiff had rested upon the evidence adduced on his behalf, the court, on motion of the defendant, instructed the jury to find their verdict for the defendant. A verdict was so returned and judgment was entered accordingly.

W. R. CURRAN, for appellant.

JACK & TICHENOR, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

We are of the opinion that the circuit court erred in sustaining the demurrer to the first and fourth counts of the amended declaration, and to the replication to the second plea to the second count, and in instructing the jury to find their verdict for the defendant. The ground upon which the circuit court, and, on appeal, the Appellate Court, proceeded, was that the contract sued on was a contract for an option, which is declared by section 130 of the Criminal Code to be a gambling contract and void. Since the judgment in this case was affirmed by the Appellate Court we have had occasion to construe a contract similar in all its legal aspects to the one here in question, so far as affected by the said section of the Criminal Code, and we reached the conclusion that such contracts do not fall within the category of those condemned by the statute; that they are not gambling contracts and are not void. (*Wolf v. National Bank of Illinois*, 178 Ill. 85.) On this question the case at bar is "on all fours" with the case cited and must be controlled by it. Under the allegations of the first, second and fourth counts, and under the evidence adduced, the plaintiff was entitled to recover.

The judgments of the Appellate and circuit courts are both reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views we have expressed.

*Reversed and remanded.*

182	512
118a	*354

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JACOB GLOS

v.

JOHN S. GOULD.

*Opinion filed October 16, 1899—Rehearing denied December 9, 1899.*

1. **TAX DEEDS**—*when tax deed is invalid because of insufficient affidavit.* A tax deed is invalid where the affidavit upon which it is based fails to state the notice of purchase was served upon the owner. (Rev. Stat. 1874, sec. 216, p. 893.) Nor is it sufficient to allege that upon diligent search the only owner found was a specified person, upon whom notice was served "as owner," and that such person "had some interest, either as owner or otherwise, in the premises."

2. **SAME**—*when defendant may be required to pay his own costs on setting aside tax deed.* In a suit to set aside a tax deed, in which the relief prayed for is granted, the defendant cannot complain that he was required to pay his own costs, where, before commencement of the suit, he refused a tender of the amount due, with interest.

3. **INTEREST**—*since 1891 interest rate on amount paid at tax sale is five per cent.* Interest at the rate of five per cent, only, is recoverable, since the passage of the Interest law of 1891, upon the amount of taxes paid by a purchaser of lands at tax sale.

CARTWRIGHT, C. J., and CRAIG and BOGGS, JJ., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

ENOCH J. PRICE, for appellant.

KERR & BARR, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The appellee filed a bill against the appellant to set aside a certain tax deed held by appellant upon a lot in the city of Chicago belonging to the appellee. The cir-

cuit court granted the relief prayed for and set aside the tax deed, and the defendant prosecutes this appeal.

Five several grounds of invalidity of the tax deed are charged in the bill, but in the view we take it is necessary to consider but one, and that is, whether the affidavits on which the tax deed issued were sufficient on which to base the deed.

Appellant insists that under the averments of the bill and the findings of the decree the complainant is not entitled to the relief granted. The bill states that there are on file in the office of the county clerk an affidavit and notice, which constitute the only evidence on which said tax deed was issued. They are attached to the bill and made a part thereof, and are alleged to be void and not in compliance with the statute.

Section 217 of the Revenue act provides: "Every such purchaser or assignee, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of the foregoing section, stating particularly the facts relied on as such compliance, which affidavit shall be delivered to the person authorized by law to execute such tax deed." The "foregoing section" referred to (section 216) provides that no purchaser, or assignee of such purchaser, of any land at any sale for taxes or special assessments shall be entitled to a deed to the land so purchased by him until certain conditions have been complied with, among which are: that "such purchaser or assignee shall serve, or cause to be served, a written or printed, or partly written or partly printed, notice of such purchase on every person in actual possession or occupancy of such land or lot; also, the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he or she can be found in the county; also, the owners of or parties interested in said land or lot, if they can, upon diligent inquiry, be found in the county, at least three months before the expiration of the time of redemption on such sale."

The affidavit on which the deed herein was based did not state positively that Jennie Hall was the owner. The affidavit states that appellant "made diligent search and inquiry for the owner of the lots described in said certificate and was unable to find any of said owners except Jennie Hall, the person served with notice, and was unable to find the names of said owners, except Jennie Hall." This allegation of the affidavit contains no definite statement that Jennie Hall was the owner, but only an inference that she might be regarded as owner. Appellant in his affidavit further proceeds to state that he "caused to be served the notice on Jennie Hall, as owner." We held in *Stillwell v. Brammell*, 124 Ill. 338, that such an allegation as this does not meet the requirements of section 216. "That section says that the owner must be served. It is not sufficient that service is had upon some one whom the party making the service may choose to designate as owner. The person to be served is he in whose name the land is taxed or specially assessed, and not some individual who may be regarded as the person contemplated by the statute." Appellant further proceeds to make the following statement in his affidavit: "Affiant makes the certificate, notice and affidavits attached, part of this affidavit, and relies upon the facts therein stated as a compliance with the law," etc. The only statement made in regard to the ownership of Jennie Hall in the attached affidavits is the statement in the additional affidavit of George W. Thoma, which is as follows: "Affiant is informed and believes that Jennie Hall at said date had some interest, either as owner or otherwise, in the premises described." This allegation is not sufficient. Section 216 requires notice to be served upon the owner, and not upon a person who, according to the information and belief of the affiant, may have some interest, as owner or otherwise, in the premises. Therefore the facts in the attached affidavit did not show a compliance with the

law, so far as service upon the owner is concerned. For this reason it was fatally defective.

Complaint is made by appellant that he was only allowed five per cent. interest, instead of six per cent, upon the amount of taxes paid by him. The decree recites that the appellee brought into court and paid to the clerk thereof, for the use of appellant, \$330 in full compensation for the taxes, assessments and costs paid out by the defendant, and interest thereon at the rate authorized by law. There was no error in figuring interest at the rate of five per cent, inasmuch as the amendment to the Interest law passed in 1891 changed the rate of interest upon such items as those here involved from six to five per cent.

Complaint is further made by the appellant that he was required to pay costs. Upon an examination of the decree we find that it directs each party to the suit to pay his own costs, and as appellant paid no other costs than the sum of three dollars for an appearance fee we do not think that any injustice was done him in this matter. The cases referred to by counsel as holding that, in suits to set aside tax deeds as clouds, in the absence of a tender before suit the court should require the complainant to pay all the costs, are inapplicable to the present case. The bill here substantially alleges that a tender was made, before the filing of the bill, of more than the amount due for payments made at the tax sale, and for penalties and subsequent taxes and assessments and interest, and appellee offers in the bill to pay the same, and also avers that appellant rejected the tender so made and claimed to be the owner by tax deed.

The decree of the circuit court is affirmed.

*Decree affirmed.*

CARTWRIGHT, C. J., and CRAIG and BOGGS, JJ., dissenting.



WILLIAM B. PORTER *et al.*

v.

THE PEOPLE *ex rel.* Samuel S. Greeley *et al.**Opinion filed October 16, 1899—Rehearing denied December 8, 1899.*

1. BILL OF EXCEPTIONS—*when bill becomes part of record.* A bill of exceptions, settled and signed within the time ordered, becomes part of the record though not filed with the clerk until later, where no time for filing was fixed by the court and the parties stipulated that it be filed.

2. QUO WARRANTO—*proceeding cannot be instituted without consent of Attorney General or State's attorney.* A quo warranto proceeding under section 1 of act entitled "Quo Warranto," (Rev. Stat. 1874, p. 787,) can only be instituted by the Attorney General, or the State's attorney of the county in which it is brought, and it cannot be maintained by private individuals without the consent of one of such officers or petition by one of them for leave to file the information, though private rights are involved and no other remedy available.

CARTER and BOGGS, JJ., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

W. F. STRUCKMANN, for appellants:

Informations in the nature of *quo warranto*, affecting public rights alone, cannot be brought by a private relator. *People v. Railway Co.* 88 Ill. 537; *Hesing v. Attorney General*, 104 id. 292; *Miller v. Palermo*, 12 Kan. 14; *Murphy v. Bank*, 20 Pa. St. 415; *Commonwealth v. Cluley*, 56 id. 270.

Only the State can complain of injury to the public or that public rights are being interfered with. *People v. Railway Co.* 88 Ill. 537; *Coquard v. Linseed Oil Co.* 171 id. 480.

All cases affecting private or individual rights only, and merely affecting the administration of the corporation, may be instituted upon private relation. The existence of any corporation is purely a matter of public right, and can be inquired into only upon the relation of a duly authorized public agent. *People v. Railway Co.* 88 Ill. 537; *People v. Palermo*, 12 Kan. 14; *Commonwealth v. Cluley*, 56

Pa. St. 270; *Commonwealth v. Swank*, 79 id. 156; *Murphy v. Bank*, 20 id. 415; *Robinson v. Jones*, 14 Fla. 256.

LOUIS M. GREELEY, for appellees:

The appellants were *de facto* officers by virtue of their election, exercising an office to which the power to levy taxes is incident. *Trumbo v. People*, 75 Ill. 561.

The relators have no remedy except by *quo warranto*. They cannot raise the illegality of the district as a defense, on an application for judgment of sale for taxes. *People v. Nelson*, 133 Ill. 565; *Aldis v. South Park Comrs.* 179 id. 424; *Trumbo v. People*, 75 id. 561.

Equity will not enjoin the collection of the taxes on the ground the district is illegal. *Renwick v. Hall*, 84 Ill. 162; *Keigwin v. Drainage Comrs.* 115 id. 347.

The court has declared that the remedy by *quo warranto*, in cases of this kind, is adequate, and has refused relief in equity on this ground. *Renwick v. Hall*, 84 Ill. 162; *Keigwin v. Drainage Comrs.* 115 id. 347.

The English Statute of Anne was especially designed to take away from the crown officers the right to control the initiation of proceedings of private *quo warranto* and vest such control wholly in the court. *Rex v. Wardroper*, 4 Burr, 1693; *Rex v. Trelawney*, 3 id. 1616; Cole's Crim. Inf. (Law Lib. vols. 556 and 557,) p. 125.

This statute for the first time made *quo warranto* a civil remedy for a private grievance. Before, it had been solely a prerogative remedy not obtainable by a subject. High on Ex. Legal Rem. (3d ed.) sec. 602.

Our own statute of *quo warranto* must also be deemed to have lodged in the court the sole discretion as to allowing or refusing the remedy in cases of private *quo warranto*. *People v. Railway Co.* 88 Ill. 537; *People v. Waite*, 70 id. 25.

A private *quo warranto* is deemed a mere civil remedy for a private grievance, and is criminal only in form. *People v. Shaw*, 13 Ill. 587; *Ensminger v. People*, 47 id. 384;

*Donnelly v. People*, 11 id. 552; *People v. Bruennemer*, 168 id. 482; High on Ex. Legal Rem. (3d ed.) sec. 621; *People v. Boyd*, 132 Ill. 60.

The remedy by private *quo warranto* is, of right, in favor of a relator having the requisite interest, and not precluded by his conduct from making objection. *People v. Railway Co.* 88 Ill. 537; *People v. Waite*, 70 id. 25; *Queen v. Justices of Surrey*, L. R. 5 Q. B. 466; *People v. Schnepf*, 179 Ill. 305.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an information in the nature of *quo warranto*, purporting to be by Charles S. Deneen, State's attorney of Cook county, upon the relation of Samuel S. Greeley and others, against William B. Porter and others, to oust them from the offices of the board of education of a joint high school district, embracing certain territory in townships 38 and 39, Cook county, Illinois. The petition is based upon the alleged illegality of the district because of irregularity in the proceedings for its formation and for want of authority of law to organize the same. It is alleged in the information that the defendants, assuming to act as such board of education, have levied a tax for the purposes of the district, the relators being residents and tax-payers within the district. To the information the respondents filed a general demurrer, which was overruled, and they declining to answer over, a judgment of ouster was entered against them. To reverse that judgment they prosecuted this appeal.

The petition for leave to file the information was in the name of the relators alone, it being alleged that the prosecuting attorney had arbitrarily and without reason, and for the purpose of preventing a proceeding inquiring into the legality of the formation of the district, refused to file such petition or to permit petitioners to commence or prosecute said proceeding in his name. Upon a rule to show cause why leave to file the information should

not be granted the prosecuting attorney appeared, and alleged that there was no jurisdiction in the court to permit the proceeding to continue in the name of the People at the instance of private relators, and that, as State's attorney, he did not consent to proceedings being conducted in his name, stating reasons for his so refusing, and supporting the same by affidavits, and asking that the order permitting the filing of the petition and for a rule to show cause why it should not be granted be vacated and the petition dismissed; but the court held "that said motion to dismiss the petition herein be and the same is hereby sustained as far as the rights of the People, only, are concerned, but so far as the private rights of the said relators are concerned, and in all other particulars, said motion is denied, but full jurisdiction of said petition and this proceeding is expressly and fully sustained, so far as may be necessary to enforce and protect the rights and interests of said petitioners, or any of them." To this ruling the State's attorney, in his own behalf and on behalf of the People, duly excepted.

The motion of the prosecuting attorney, the affidavits filed in support of it, and the rulings of the court thereon, appear in the record by bill of exceptions. Prior to submission of the cause a motion was entered by appellees in this court to strike that bill of exceptions from the files, the grounds of the motion being that it was not filed within the time allowed by the court below, and that the State's attorney was not a party to the proceeding, and therefore not entitled to file exceptions. On March 30, 1899, an order was entered allowing the State's attorney thirty days in which "to present and settle a bill of exceptions." It was settled and signed by the judge within that time. No order was made by the court as to the time within which it should be filed with the clerk. On May 9 following, the prosecuting attorney, for himself and the People, and the attorney for the relators, signed a stipulation for filing it, and within the stipulated time

it was filed, but it is now contended by counsel for the appellees, that, notwithstanding the stipulation, it was improperly so filed for want of an order of the court authorizing it. We do not think the right to deposit the bill of exceptions with the clerk to be filed depended upon the validity of the stipulation of counsel. It was filed after being settled and signed within the time fixed by the court. Neither the statute nor any order of the court required it to be filed in the clerk's office within a particular time, and we see no good reason for holding that it did not, when filed under these circumstances, become a proper part of the record. The record does show that the prosecuting attorney of Cook county, as the representative of the People, was a party to the information and the subsequent proceeding upon his motions, and entitled to file the exceptions shown by the bill in question. The motion to strike the bill of exceptions and the assignment of errors by the State's attorney from the record will be overruled.

↓  
The important preliminary question in this case is whether the petitioners were legally authorized to institute this proceeding in their own names without the consent of "the Attorney General or State's attorney of the proper county." The facts necessary to the presentation of this question do not depend upon the bill of exceptions alone. As before stated, it is shown by the petition that the prosecuting attorney did not consent to the filing of the petition, nor is it pretended that the Attorney General was ever applied to for that purpose, or that he in any way refused or declined to bring the same. It is said by counsel, that for the purpose of this suit we must consider the State's attorney as tacitly consenting to the use of his name in this proceeding, and yet the petitioners show and alleged in their petition that he did not so consent, but, as they say, arbitrarily and for insufficient reasons refused to do so. Considering the facts shown by the bill of exceptions, it appears that he so refused

because, upon a consideration of the whole case, he honestly regarded it as his official duty to do so. That, however, we do not regard as of controlling importance here. As we understand our statute a *quo warranto* proceeding under it can in no case be instituted except by the Attorney General of the State or the State's attorney of the county in which it is brought. In cases affecting the public right alone, either of these officers may present the petition of his own accord, or if private rights are also involved he can do so at the instance of any individual relator. (2 Starr & Cur.—1st ed.—chap. 112, sec. 1, p. 1871.) We said in *People ex rel. v. North Chicago Railway Co.* 88 Ill. 537, after quoting the language of that section: "There is nothing here that authorizes any one other than the Attorney General or State's attorney to present a petition for leave to file an information." To the same effect is High on Extraordinary Legal Remedies, sec. 697. That author also says (sec. 45): "Where, under the laws of a State, the Attorney General is empowered to determine in what cases proceedings by information in the nature of a *quo warranto* shall be instituted to try the title to any public office or franchise, he is regarded as vested with a discretion the exercise of which is in its nature a judicial act, over which the courts have no control; and when such officer has declined to institute proceedings to try the right to an office, *mandamus* does not lie to reverse his decision or to compel him to bring the action,"—citing *People v. Attorney General*, 22 Barb. 114. It is not enough, under our statutes, that the petition be presented by the Attorney General or State's attorney, but the same must be in the name of such officer, either upon his own motion or upon the relation of another. *People ex rel. v. North Chicago Railway Co. supra.*

It is argued by counsel for petitioners that they seek redress for a private injury, and therefore they should be allowed to prosecute the action in their own names, and it seems to have been held by the learned judge be-

low that for such purpose they may use the name of the State's attorney without his consent. The proceeding by information in the nature of a *quo warranto* does not lie except in cases where the public has an interest, and it does not follow because private rights may also be involved the public is not an interested party. On the contrary, it can readily be seen that in every case where the *quo warranto* statute is attempted to be used as a remedy, the public right is, to a greater or less extent, involved. Mr. High, in his work from which we have quoted above, at section 620 says: "To warrant a court in entertaining an information in the nature of a *quo warranto*, a case must be presented in which the public, in theory at least, have some interest; and it is not an appropriate remedy against persons alleged to have assumed a trust of a merely private nature, unconnected with the public interests,"—citing *People ex rel. v. Ridgley*, 21 Ill. 66.

While it may be true that the only remedy available to petitioners is by *quo warranto*, we are not prepared to hold that private individuals may, notwithstanding the provision of our statute, avail themselves of this extraordinary remedy without the consent of the Attorney General or State's attorney, and without the petition for leave to file the information in the name of one of those officers, upon the relation, etc.

The court below erred in allowing the information to be filed over the objection of respondents, and in subsequently refusing, on the motion of the State's attorney, to vacate and set aside that order. Its judgment will accordingly be reversed.

*Judgment reversed.*

CARTER and BOGGS, JJ., dissenting.

## THE CHICAGO AND ALTON RAILROAD COMPANY

v.

THERESA FELL.

182	528
190	*805
182	528
99a	1484

*Opinion filed October 13, 1899—Rehearing denied December 13, 1899.*

1. TRIAL—*court must refuse peremptory instruction for defendant if the evidence tends to prove plaintiff's case.* In an action against a railroad company to recover for personal injuries sustained at a public crossing, a peremptory instruction for the defendant is properly refused where there is evidence tending to prove that the plaintiff used due care and was injured by the negligent acts of the defendant company, as alleged.

2. APPEALS AND ERRORS—*in passing on refusal of a peremptory instruction Supreme Court does not weigh evidence.* In passing upon the propriety of the trial court's refusal of defendant's peremptory instruction in a personal injury case, it is not the province of the Supreme Court to say that evidence in the record tending to prove the plaintiff's allegations of due care and negligence was overcome by the weight of contrary evidence.

*Chicago and Alton Railroad Co. v. Fell*, 79 Ill. App. 376, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding.

J. E. POLLOCK, (WILLIAM BROWN, of counsel,) for appellant.

FIFER & BARRY, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellee recovered a judgment in the McLean circuit court, against appellant, for a personal injury, which judgment the Appellate Court affirmed, and thus settled adversely to appellant all controverted questions of fact involved in the case. At the close of the evidence defendant asked the court to instruct the jury to find defendant not guilty, and the refusal of this instruction is the principal error insisted upon here by appellant.



The evidence shows that the plaintiff, at the time she was injured, was going to the depot of the defendant, in Bloomington, at about one o'clock in the afternoon, to meet her mother, who was expected to arrive about that time on a train coming northward on appellant's road. The plaintiff was nearing the depot, walking on Washington street, a public street of the city continuously used at that place by many people, and had stepped across the nearest rail and upon the track of defendant's road, which there crossed Washington street on the street grade, when she was struck by the engine of a south-bound passenger train of defendant and thrown to the side of the track. Her right foot was run over by a wheel of the forward car and so crushed and mangled as to require amputation, and she was injured in other parts of her body also. Whether she looked or listened, or otherwise observed proper caution to ascertain whether a train was approaching before she stepped upon the track, and whether her view was obstructed and the noise of the train drowned by other noises proved, and whether the trainmen in charge of the engine were observing a proper lookout to avoid collisions at such public crossing and were or not running the train at a speed prohibited by the ordinances of the city, and whether or not the bell was rung or whistle sounded as required by the statute, were all questions of fact controverted on the trial and finally settled before the case reached this court.

We cannot agree to the view of appellant's counsel that there was no evidence to go to the jury tending to prove that the plaintiff used due care for her own safety and was injured by the negligent acts of the defendant, as charged in the declaration. The record shows such evidence, and it is not within our province to say that it was overcome by the weight of evidence to the contrary. The decision of the court in refusing the instruction and in submitting the issue to the jury was correct.

Exceptions were taken to the rulings of the court in giving and refusing other instructions, but we find no error in those rulings.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

EMANUEL LEVY.

*Opinion filed October 13, 1899—Rehearing denied December 14, 1899.*

PLEADING—when general allegation is sufficient to authorize damages for the injury proven. In an action where injury to the "back, spine and brain" is alleged, and the evidence tends to show that such injury was the natural and proximate cause of the defective nutrition to the optic nerve and impairment of the plaintiff's eyesight, the damages claimed therefor are not special, but general, and can be recovered without being declared for specially.

WILKIN, J., and CARTWRIGHT, C. J., dissenting.

*West Chicago Street Railroad Co. v. Levy*, 82 Ill. App. 202, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

VANVECHTEN VEEDER, for appellant.

JOHN F. WATERS, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Cook county, against appellant, for a personal injury. Appellee was driving in a buggy on Robey street when appellant's electric car came up from behind and struck the buggy, threw appellee out and injured him.

182	525
91a	1494
182	525
99a	583
182	525
194	85
196	470
182	525
e105a	556

Respecting the injury and damages the declaration alleged that the plaintiff "was severely and dangerously cut, bruised, wounded and injured, both internally and externally; that plaintiff's back and spine and brain were thereby then and there severely and dangerously and permanently injured, and divers bones of his body, arms and limbs were then and there and thereby fractured and broken, and plaintiff was otherwise severely, dangerously and permanently injured, both internally and externally;" that on account of said injuries "plaintiff became sick, sore, lame, disordered and injured, and so remained for a long space of time, during which said time he suffered great bodily pain and mental anguish, and still is languishing and intensely suffering in body and in mind, and in future will continue to suffer from the effect of said injuries for the rest of his natural life." And the principal assignment of errors relied on is that the court permitted the plaintiff to prove that one of the effects of his injuries was atrophy of the optic nerve and consequent impairment of his eyesight. The contention is, that the evidence showed that this condition of the optic nerve was produced by defective nutrition, and not by any direct injury it received in the accident; that it was not the natural and necessary result of the injury, and could not therefore be proved under the allegation of general damages, and, not having been alleged as special damages, could not be proved at all. We are of the opinion that the evidence was properly admitted under the allegations. It is not necessary to allege specially every injury to each part of the body, in actions of this character, in order to prove them on the trial. Injury to the back, spine and brain was alleged, and the evidence tended to show that such injury was the natural and proximate cause of the defective nutrition to the optic nerve and impairment of the plaintiff's eyesight. The damages claimed, therefore, were not special, but gen-

eral, and could be recovered without being declared for specially. See *Lake Shore and Michigan Southern Railway Co. v. Ward*, 135 Ill. 511; *Chicago and Erie Railroad Co. v. Meech*, 163 id. 305; *North Chicago Street Railroad Co. v. Brown*, 178 id. 187; *Tyron v. Booth*, 100 Mass. 258; *Baltimore and Ohio Southwestern Railway Co. v. Slanker*, 180 Ill. 357.

It is also insisted that a new trial should have been granted below because of the highly improper language and conduct, on the trial, of the attorney for the plaintiff. The record does show such reprehensible language and conduct, but the trial judge interposed to suppress it and sustained all the objections of the defendant, and we are unable to see that the plaintiff could have been benefited in any way by the conduct in question of his counsel, or that the defendant was prejudiced thereby. This must have been the view of the trial judge in overruling the point in the motion for new trial, and in this we are inclined to hold there was no error.

There was no error committed in the instructions, and we cannot reverse the judgment because it may appear that the damages are excessive.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

MR. JUSTICE WILKIN: I dissent. The verdict and judgment in this case is for \$10,000. The unprofessional conduct of counsel for the plaintiff prevented an orderly, fair and impartial trial, and for that reason the verdict of the jury should have been set aside and a new trial granted.

MR. CHIEF JUSTICE CARTWRIGHT concurs in the dissent of WILKIN, J.

THE PEOPLE *ex rel.* Ahern

v.

JAMES A. BOLLAM.

*Opinion filed October 19, 1899.*

CONSTITUTIONAL LAW—*statute authorizing village board to appoint constable is unconstitutional.* Sections 11 and 12 of article 11 of the City and Village act, (Rev. Stat. 1874, p. 243,) authorizing the president and board of trustees to appoint a constable, are in that respect in violation of section 21 of article 6 of the constitution, which directs that such officers shall be elected.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

This is a proceeding by information in the nature of *quo warranto* in the name of the People of the State, filed in the circuit court of Cook county on September 16, 1898, by the State's attorney of that county, charging that the defendant, James A. Bollam, for a space of over one month then last past and more during the year 1898, unlawfully held and still does hold and execute without any warrant or right whatsoever, the office of constable in and for the township of Bloom in the village of Columbia Heights, Cook county, and, during all of said time had usurped, and still does usurp the rights, privileges and duties of the office of constable in and for said township in said village in said county, to the damage and prejudice of the People, and against the peace and dignity of the same. To this information, the defendant, Bollam, filed a disclaimer of title to the office of constable in and for said township in said village.

On September 30, 1898, an amended information was filed, which was the same in every allegation as the original information, except that the village of Steger was substituted for the village of Columbia Heights. To this amended information the defendant, Bollam, pleaded jus-

tification, setting forth that on April 25, 1898, he was duly and legally appointed to the office of constable by the president and board of village trustees of the village of Steger in said township and county under and by virtue of section 11 of article 11, part 1, of the City and Village act (1 Starr & Curt.—2d ed.—p. 791); that, after his appointment, he took the oath of office, and gave bond as required by law, and received from the clerk of the village of Steger a certificate of appointment and qualification, and, under section 12 of said article 11 (id. p. 792) became and was entitled to hold and execute the duties and privileges of the office of constable in and for the entire county of Cook, as well as of the village of Steger in said township of Bloom; and that by his said warrant he still holds and executes the said office of constable.

By stipulation, all further pleadings were waived, and the cause was heard by the court on the amended information and the answer thereto, and on an agreed statement of facts in writing, signed by the respective parties. By the stipulation, propositions of law were to be offered by the People and the defendant, to be held or refused or modified by the court; and the cause proceeded to be heard upon the constitutionality of said sections 11 and 12. It was therein stipulated that the title to the office of constable, held by the defendant, should be determined by the decision of the question as to the constitutionality of said sections.

Upon the trial, counsel for the People requested the court to hold, as matter of law, that said sections 11 and 12 were in conflict with section 21 of article 6 of the constitution of the State of Illinois, and therefore null and void. The proposition of law, so submitted by the People, was refused by the court, and counsel for the People excepted. Counsel for the defendant below, appellee here, requested the court to hold, as matter of law, that said sections 11 and 12 were not in conflict with the constitution of the State. This proposition was held by the court

as offered, and exception was taken by the counsel for the People.

The court below declined to hold the defendant guilty in manner and form as charged in the information, and dismissed the information at the relator's costs. Exception was taken by the People to this judgment of the circuit court, and the present appeal is prosecuted from said judgment.

CHARLES S. DENEEN, State's Attorney, (JOSEPH A. MCINERNEY, and T. A. COFFEY, of counsel,) for appellant.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The only question involved in this case is, whether sections 11 and 12 of article 11 of part 1 of the City and Village act are constitutional or not. Those sections, so far as they relate to the office of constable, are as follows:

"Sec. 11. The president and board of trustees may appoint \* \* \* a village constable and such other officers as may be necessary to carry into effect the powers conferred upon villages, to prescribe their duties and fees, and require such officers to execute bonds as may be prescribed by ordinance.

"Sec. 12. The village constable shall have the same powers to make arrests, execute process, and perform other official acts, as other constables under the general laws of the State, together with such other powers as may be conferred on him by ordinance."

The provision of the constitution, with which these sections are alleged to be in conflict, is section 21 of article 6 of the constitution of 1870. Section 21 of article 6 of the constitution is as follows: "Justices of the peace, police magistrates, and constables shall be elected in and for such districts as are, or may be, provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform."

Sections 11 and 12 provide for the appointment of a village constable by the president and board of trustees of the village, and that such constable shall have the same powers to make arrests, execute process, and perform other official acts, as other constables under the general laws of the State. The constitution, on the contrary, provides that constables shall be elected in and for such districts as are or may be provided by law. It would seem to be clear that, where a statute of the State directs a certain official to be appointed, when the constitution of the State requires him to be elected by the people, such statute is in conflict with the constitution.

The constitution does not authorize the legislature to prescribe the manner in which constables shall be selected, but merely that the legislature shall provide by law for the districts in and for which they are to be elected. The legislature of this State did provide by law, in an act approved June 26, 1895, entitled "An act to revise the law in relation to justices of the peace and constables," that constables should be elected at a certain time, and at certain elections, in counties under township organization, and at a certain time, and at certain intervals, in each election precinct in counties not under township organization. (Laws of Ill. 1895, p. 182). Section 1 of article 1, of the act of June 26, 1895, was amended by an act, approved March 17, 1897. (Laws of Ill. 1897, p. 246). Section 1 of article 1 of the act in regard to justices and constables, as thus amended, provides for the number of constables to be elected in each town in counties under township organization. Cook county is under township organization. Inasmuch as the constitution provides, that constables shall be elected in and for such districts as may be provided by law, and inasmuch as the legislature has provided by law for the election of a certain number of constables at certain times in each town in counties under township organization, it necessarily follows, that a so-called constable, who is not thus



elected in the district provided by law, but is appointed by the president and board of trustees of the village, has no power to act or perform the duties of constable.

The provision of the constitution, that constables shall be elected, is mandatory. It is a well established rule of constitutional construction, that, when the constitution defines the circumstances under which a right may be exercised, the specification is an implied prohibition against the right of the legislature to add to the condition. (Cooley's Const. Lim.—6th ed.—pp. 78, 79). The Illinois constitution of 1870 prescribes election by the people, in districts to be fixed by the legislature, as the mode of selecting constables, and this specification of the mode of selection is an implied prohibition against the right of the legislature to prescribe any other mode. In *Field v. People*, 2 Scam. 79, we said: "Where the means for the exercise of a granted power are given, no other or different means can be implied as being more effectual or convenient." Accordingly, it has been held that where the constitution defines the qualifications of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly, or, by necessary implication, conferred by the constitution itself. (*Thomas v. Owens*, 4 Md. 189; *Barker v. People*, 3 Cow. 686; *Matter of Dorsey*, 7 Port. 298; Cooley's Const. Lim. *supra*).

Section 24 of article 5 of the constitution of 1870 says, that "an office is a public position created by the constitution or law," etc. The constitution thus recognizes two classes of officers, one which is created by the constitution itself, and the other, which is created by statute. Where an office is created by statute, it is wholly within the control of the legislature, creating it. But when an office is created by the constitution, it cannot be enlarged or lessened in scope by any statute, or be filled in any other manner than the manner directed by the constitution. (*People v. Loeffler*, 175 Ill. 585).

We are of the opinion, that sections 11 and 12 of article 11 of part 1 of the City and Village act are in conflict with section 21 of article 6 of the constitution upon the ground above stated, so far as they provide for the appointment of constables. Accordingly, the judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to enter judgment of ouster in accordance with the prayer of the information.

*Reversed and remanded.*

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HARRY SWISHER

v.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

*Opinion filed October 16, 1899—Rehearing denied December 14, 1899.*

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1. APPEALS AND ERRORS—when Supreme Court is precluded from a consideration of the case. The recital in the judgment of the Appellate Court, reversing without remanding, of ultimate facts covering the entire right of recovery as made by the pleadings in an action for negligence, precludes, under the statute, further consideration of the case by the Supreme Court, in the absence of errors of law.

2. SAME—when Appellate Court's recital of facts precludes a recovery. In an action for injuries to a fireman by collision occasioned by a misplaced switch, which, it is alleged, had no light thereon to indicate the way it was turned, a finding by the Appellate Court that the injury was the result of a risk incident to the plaintiff's employment, that it occurred in the day time when lamps were not needed, and that it was occasioned by the negligence of a fellow-servant of the plaintiff, precludes a recovery under such facts.

MAGRUDER, J., dissenting.

*Illinois Central Railroad Co. v. Swisher*, 74 Ill. App. 164, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lee county; the Hon. JOHN C. GARVER, Judge, presiding.

This is an action by appellant, against appellee, to recover damages for personal injury.

The original declaration was amended, and as amended contained two counts, which, in effect, aver the plaintiff, while in the service of the defendant, was a locomotive fireman, and while he and his engineer were in the exercise of reasonable care and caution he was injured at the station of Sublette on the third day of May, 1892, by a collision between a passenger engine which he was firing, going south, and a switch engine of the defendant heading north and standing on the east side-track at that place. Each count alleges that there were standard or rotary switches at that station, with targets painted white and targets painted red, the former, when facing an approaching engine, indicating the main track was safe, and the latter, when so placed, indicating it was not safe for a train to pass over that track. In each count it is averred that the targets were only for use in the day time, and when completed the switches had lamps on them to be used in the night time, and that the defendant negligently failed to put lamps on them, by reason of which the plaintiff was injured in the night time, when it was dark.

On May 4, 1896, two additional counts were filed, the first of which alleges that it was the duty of the defendant, through its servants, to use reasonable care and diligence to keep the switch in question closed, so the train could pass along the main track without going upon the side-track, but the defendant, through its servants, did not keep said switch closed, and did not, through its servants, exercise reasonable care or diligence to keep the same closed, and that by reason of said negligence of defendant, through its servants, about seven o'clock in the afternoon of May 3, 1892, the Dubuque and LaSalle passenger train, on which plaintiff was a fireman, and while he and his fellow-servants were in the exercise of reasonable care, was diverted from the main track onto the side-

track at the station of Sublette, and collided with the engine of a freight train standing on the side-track, thereby greatly injuring the plaintiff, and that said switch was not permitted to remain open by any of the fellow-servants of the plaintiff.

The second count avers that it was the duty of the defendant, by its servants, to use reasonable care to keep the switch in question closed until the engine and train had passed by it, but that the defendant, by its servants, did not keep said switch closed, and that while said train was being run along said main track approaching said switch, at about seven o'clock in the evening of May 3, 1892, defendant, by its servants, carelessly opened said switch before said locomotive reached it, and negligently, by its servants, permitted it to be and remain open until said engine reached it, and in consequence of said negligence said engine and train were diverted from said main track onto said side-track and came in collision with the engine on the side-track which was there, without fault of the plaintiff or his fellow-servants, and that by reason of said collision the plaintiff was greatly injured without his fault or the fault of any of his fellow-servants, and that the switch was not opened through the fault of the plaintiff or any of his fellow-servants.

On trial in the circuit court of Lee county a verdict and judgment were rendered in favor of the plaintiff, which, on appeal to the Appellate Court for the Second District, were reversed and the cause was not remanded.

The Appellate Court, in its judgment, made a finding of facts, which was recited in the final order of that court, as follows: "And the court finds as facts, from the evidence in the case, that the injury to appellee, under the original declaration as amended, was the result of the risks incident to his employment, and occurred in the day time, when lamps were not required on the switch of the appellant, and the injuries resulting to him by reason of the negligence averred in the additional counts

of the declaration were occasioned by the negligence of a fellow-servant of appellee directly co-operating with him in the particular business in hand and in the same line of employment in which the injuries were sustained."

MORRISON & BETHEA, S. B. POOL, and HENRY S. DIXON,  
for appellant.

WILLIAM BARGE, H. A. BROOKS, and C. LEROY BROWN,  
for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

By the final order of the Appellate Court for the Second District the ultimate facts found were that the injury was the result of the risks incident to plaintiff's employment; that the accident occurred in the day time, when lamps were not required on the switch of defendant, and that the injury was occasioned by the negligence of a fellow-servant of plaintiff directly co-operating with him and in the same line of employment. These findings are all as to ultimate facts and not as to evidentiary facts, and hence are conclusive on this court. (*Caywood v. Farrell*, 175 Ill. 480, and authorities there cited.) The ultimate facts as found by the Appellate Court, covering the entire right of recovery, as averred in the pleadings in this case, having been by the Appellate Court adjudicated adversely to the plaintiff, the appellant here, and being all with reference to facts the determination of which is conclusive of the action, we are precluded by the statute from a further consideration of the case.

The judgment is affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER, dissenting:

This is an action on the case, brought by the appellant against the appellee company to recover for injuries received by him on May 3, 1892, at the village of Sublette in Lee county.

The original amended declaration contained two counts. The first count alleged that the plaintiff was injured on said day on account of a collision between a passenger train going south, upon which he was acting as fireman, and a freight train of the appellee company, heading north and standing on the east side-track at the station in the village of Sublette; that the passenger train ran through an open switch; that the target on said switch was prepared for a lamp, but no lamp was furnished by the company, and none was on the switch. The proof tends to show, that the collision occurred about fifteen minutes after seven o'clock in the evening of said day; that it was cloudy and dark at the time; that, if there had been a light on the switch, the engineer on the passenger train could have seen the switch turned in time to stop the train and could have prevented a collision; that the main track and east and west side-tracks at said place and the switches were used both in the day time and in the night time under the directions of the defendant; that the person or persons, whose duty it was to furnish the proper appliances of said switch, and signal lights to place thereon, and the necessary appliances for the ordinary safety of the company's employes, were not fellow-servants of the plaintiff; that the plaintiff had no knowledge of the incomplete condition of the switch or of the neglect of the defendant to place signal lights thereon; that the same were necessary for the safety of the plaintiff and his fellow-servants.

The second count is substantially the same as the first, but does not allege that the injury occurred in the night time; on the contrary, the second count alleges that sufficient light was not afforded by the sun or the moon to see said target, and that there was no artificial light.

Under the issues made upon the two counts above described, the case was first tried before a jury in the circuit court, and resulted in a verdict and judgment in favor of the appellant for \$9375.00. Upon appeal to the

Appellate Court this judgment was reversed, and the cause was remanded to the circuit court, as will be seen by reference to the case of *Illinois Central Railroad Co. v. Swisher*, 53 Ill. App. 411. After such reversal and remandment the case was tried a second time in the circuit court before the court and a jury, and again resulted in a verdict and judgment in favor of the appellant. A second appeal was taken to the Appellate Court where the second judgment thus rendered was reversed, and the cause was again remanded to the circuit court, as will be seen by reference to the case of *Illinois Central Railroad Co. v. Swisher*, 61 Ill. App. 611.

After the second reversal and remandment of the cause to the circuit court two additional counts were filed. The first additional count alleged, that the switch was negligently permitted to be and remain open by the company and its servants, so that the engine and train in consequence of the said negligence, and as a proximate result thereof, were diverted from the main to the side-track on the easterly side of the main track, and came in collision with a locomotive engine and train of cars of the defendant standing on said side-track; that the switch was permitted to be and remain open without the fault of the plaintiff or any of his fellow-servants. The second additional count alleged, that the company, by its servants, carelessly opened said switch before the time when the locomotive was approaching, and by its servants negligently permitted the same to be and remain open, until the engine reached the same, and thereby caused the passenger train, upon which the plaintiff was working as a fireman, to run on to the side-track and collide with the freight train standing there.

Under the issues formed upon the declaration, as thus amended, consisting of the two original counts and of the two additional counts so added as aforesaid, the cause was tried a third time before the court and a jury; and the third trial again resulted in a judgment in favor of

the plaintiff and against the company for \$5000.00. The company took an appeal from the third judgment thus rendered to the Appellate Court. On December 17, 1897, the Appellate Court entered a judgment reversing the cause without remanding it. From the judgment thus entered by the Appellate Court, reversing the cause without a remandment thereof, the present appeal is prosecuted to this court.

In the judgment thus entered by the Appellate Court on December 17, 1897, the Appellate Court embodied the following finding of facts, so called, to-wit: "And the court finds, as facts from the evidence in the case, that the injury to appellee (the present appellant) under the original declaration as amended was the result of the risks incident to his employment and occurred in the day time when lamps were not required on the switch of the appellant (the present appellee); and the injuries resulting to him by reason of the negligence averred in the additional counts of the declaration were occasioned by the negligence of a fellow-servant of the appellee (the present appellant) directly co-operating with him in the particular business in hand and in the same line of employment, in which the injuries were sustained."

The facts, which the Appellate Court is required by section 87 of the Practice act to find and incorporate in its judgment, are the ultimate facts upon the existence or non-existence of which, as set up in the pleadings, the rights of the parties depend. Section 87 of the Practice act, which has often been before this court for construction, "does not mean that the Appellate Court shall find what was the evidence of the ultimate facts, or that it shall find those merely subordinate or evidentiary facts which, when established, contribute to the establishment of the ultimate fact which must exist in order to sustain the alleged cause of action." The ultimate facts thus to be found are ordinarily that the plaintiff was or was not in the exercise of ordinary care, and that the defendant was



or was not guilty of negligence. Not only are the facts thus to be found the ultimate facts above referred to, but "where the Appellate Court finds the facts different from the trial court, the facts recited must include every material issue submitted to the trial court to authorize the Appellate Court to render final judgment different from the one below. \* \* \* But a finding upon an immaterial issue, or facts which can have no bearing on the decision of the case, is not required." The recital of the facts by the Appellate Court in its judgment is only authorized by section 87 when its finding, either wholly or in part, of the facts concerning the matter in controversy is different from the finding of the trial court. Where it makes the same finding of facts as the trial court, it must affirm the judgment of the latter court, unless it finds that there is some erroneous ruling upon a question of law. The views thus expressed are sustained by the following decisions: *Hayes v. Massachusetts Life Ins. Co.* 125 Ill. 626, and cases there cited; *Hogan v. City of Chicago*, 168 id. 551, and cases there cited; *Senger v. Town of Harvard*, 147 id. 304.

The finding of facts made by the Appellate Court in this case, as above set forth, does not conform to the rules thus laid down. There is no finding of the ultimate facts, or either of them, as to whether or not the plaintiff was in the exercise of ordinary care when the injury occurred, or as to whether or not the defendant was guilty of such negligence as produced the injury.

The Appellate Court finds "that the injury to appellee (the present appellant) under the original declaration as amended was the result of the risks incident to his employment." This finding, if it be a finding of fact, is consistent with the finding of the court below which resulted in a judgment in favor of the appellant, that is, upon the assumption that the opening of a switch, and the permitting of the same to remain open, and the inability of an engineer to see the switch in time to avoid injury,

are risks incident to the employment of a fireman upon a passenger train.

In *Chicago and Alton Railroad Co. v. House*, 172 Ill. 601, where a fireman on a passenger train was killed through the negligence of the crew of another train in leaving open in the night time a switch which had no light, it was said (p. 605): "That appellant was in fault with respect to the absence of the light is not denied, but it is contended that the risk it created was accepted and assumed by the deceased. An employe does not assume all the risks incident to his employment, but only such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them, or, if extraordinary, such as are so obvious, and expose him to danger so imminent, that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment. \* \* \* 'Usual' is defined as 'common; frequent; ordinary; customary; general;' and 'ordinary,' as 'common; usual; often recurring.' It cannot truly be said that a switch left open when it should have been closed is an ordinary or usual incident in the employment of train hands on a railroad, and it is certain that no degree of light would enable the engineer to see it open except when it is open. Here there was no defect in the switch itself. Had it been used at all after it was opened, it would have prevented the accident. The duty to close it rested upon those who knew how, were well able, had full opportunity, and every motive of interest to perform that duty and a settled habit of performing it." Again in *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, we said: "As a general rule, the servant assumes the natural and ordinary risks of the business in which he engages." Still again in *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, we said: "When a servant enters into a contract of hiring with the master, he assumes all the risks ordinarily incident to the employment, and is pre-

sumed to have contracted with reference to such risks." Here, the finding made by the Appellate Court does not state that the injury was the result of the natural and ordinary risks incident to the employment of the plaintiff.

It is also well settled, that the servant does not assume the risks incident to his employment, unless such risks are known to him, or unless the risks are of such a character that he ought to have known of them. "In order to imply assent on the part of the servant to the hazards of the service, the hazards and risks must be patent, or such as the servant knows or ought to know of. The servant assumes those risks only incident to his employment, of which he has express or implied notice. A servant does not assume the risks of any danger arising from unsafe or defective methods or surroundings or instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof. He has a right to assume that the place and appliances furnished him by his master are safe and suitable for the business in which he is engaged." (Wood on Master and Servant, sec. 353; 14 Am. & Eng. Ency. of Law, pp. 843, 855; *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177; *Consolidated Coal Co. v. Haenni*, 146 id. 614). In the case at bar, the question was not whether the injury was the result of the risks incident to the appellant's employment, but whether the injury was the result of the usual and ordinary risks incident to such employment, which were known to appellant, or which the appellant ought to have known of. The first count of the original amended declaration alleges that the appellant "had no knowledge of the incomplete condition of said switch and switches and the neglect of the defendant to place signal lights thereon." Thus, the question as to whether the failure to close the switch, or the failure to give warning that the switch was open, was or was not such a risk as the appellant was bound to take notice of, or to have knowledge of, was directly made by the pleadings. Therefore, the find-

ing of the Appellate Court omits a material issue which was submitted to the trial court, and the finding actually made upon the question of risk is a finding upon an immaterial issue. It could make no difference whether the injury was the result of risks incident to appellant's employment or not, if such risks were not the usual and ordinary risks, which under the law he must be held to have assumed, or if the circumstances were not such as to charge him with notice or knowledge of such risks. The Appellate Court finds that the injury "occurred in the day time when lamps were not required on the switch of the appellant." The statement is not that lamps were not required by the rules of the company. The evident meaning of the finding, therefore, is, that lamps were not required simply because the injury occurred in the day time. Webster defines "day time" as "the time between sunrise and sunsetting." The proof in this case shows, that the accident occurred at the hour of about fifteen minutes after seven in the evening. The almanac introduced in evidence showed, that, on May 3, 1892, the sun set at fifty-seven minutes after six in the evening. It would appear, therefore, that the injury did not occur in the day time, if the definition given by Webster is correct. By the terms, however, of section 87 of the Practice act, and in view of the construction given to that act by this court, the finding upon this question of fact by the Appellate Court must be regarded as conclusive. It is, nevertheless, true that the finding is immaterial under the allegations of the second count of the original amended declaration. That count does not allege that the injury occurred in the night time, but that "the sun had then set and sufficient light was not then afforded by the sun or moon whereby a person on said locomotive and train \* \* \* could distinguish the said color of said painted sides of said target and target wings," etc. The question under this count is, whether there was sufficient light to distinguish the targets on the switch pole,

even though the time was day time instead of night time. The proof tends to show that the weather was cloudy and dark. If the weather was cloudy and dark, it was the duty of the company to see that there was a lamp upon the switch, whether the time when the injury occurred was before sunset or after sunset. The first count presents a case where the injury is alleged to have occurred in the night, and when, therefore, a lamp on the switch was necessary. The second count presents a case, in which the injury is alleged to have occurred when the weather was cloudy and dark so that there was no light from the sun, and when, therefore, a lamp upon the switch was equally necessary. Hence, the adverse finding of the Appellate Court is as to the facts set up in the first count, and not as to the facts set up in the second count. It is "the duty of the Appellate Court to recite in its final judgment its finding in respect of every controverted fact concerning every material issue submitted to the trial court, and material and necessary to the maintenance of its judgment, which it found differently from the trial court. \* \* \* Where there is a recital of the facts controlling some of the issues, and no recital of facts as to other issues, it may be presumed that the Appellate Court found, in respect of the latter, as did the trial court." (*Hawk v. Chicago, Burlington and Northern Railroad Co.* 138 Ill. 37). In *Hayes v. Massachusetts Life Ins. Co.* 125 Ill. 626, we said (p. 640): "Upon the failure of the Appellate Court to find the facts differently from the trial court upon both causes of action set forth in the declaration, it will be considered that, as to the cause of action whereof there is no finding of facts, the Appellate Court found the facts as did the court below." In such case it is error for the Appellate Court not to affirm the judgment of the circuit court. (Ibid.)

In its finding of facts, as embodied in the judgment, the Appellate Court finds that "the injuries resulting to him (appellant) by reason of the negligence averred in

the additional counts of the declaration were occasioned by the negligence of a fellow-servant of appellee (the present appellant) directly co-operating with him in the particular business in hand and in the same line of employment in which the injuries were sustained."

This is a finding that the injury was occasioned by the negligence of "a fellow-servant of appellant," that is to say, of one fellow-servant of appellant. But there was evidence tending to show, that the injury was the result of the negligence of two servants of the railroad company. Some of the witnesses testified that the switch was opened by one Irwin, who was head brakeman upon the freight train standing upon the side-track. The testimony also tended to show, that it was the duty of the station agent at Sublette to see that all switches were closed before the trains came in. One Jones was the station agent at that point, and was at the platform of the depot looking up the track before the train came in, but did not examine to see whether the switch was closed or not. There is nothing in the finding of the facts made by the Appellate Court to indicate whether the fellow-servant therein referred to was Jones, the station agent, or Irwin, the brakeman upon the freight train.

The rules of the company, as introduced in evidence, provided that "station agents will be held responsible for the position of the switches and cars therein; and in no case will they allow the switches from the main track, without orders from the trainmaster, except when a train has arrived, to enter the side-track. Station agents must know that all switches are in proper position for the passage of trains upon the main track." The testimony also shows, that "the division superintendent appoints station agents; trainmaster employs brakemen and conductors on freight trains." There is no evidence that the appellant, Swisher, and the brakeman, Irwin, knew each other, or ever worked together, or were ever associated together in any way in any kind of work. If, however,

Irwin and Swisher were fellow-servants, it does not appear that Jones and Swisher were fellow-servants. If Irwin was negligent in leaving the switch open, Jones was negligent in permitting it to remain open and in not examining it to see whether it was open, inasmuch as the proof shows that it was open at least twenty minutes before the passenger train arrived. The duty of the station agent would appear to have been a duty of supervision and inspection. The rule is, that a master's duty of supervision and inspection is one that cannot be delegated, so as to relieve the master of liability. "Whilst a corporation must act through its servants, yet when such servants are entrusted with a duty that belongs to the principal as a primary duty, the negligence of the servant entrusted with that duty is negligence for which the principal is liable." (*Chicago and Eastern Illinois Railroad Co. v. Kneirim*, 152 Ill. 458). The servant of the master who is thus entrusted with the duty of supervision and inspection is the direct representative of the master, and not a mere fellow-servant with those whose acts are subject to his supervision and inspection. (*Wenona Coal Co. v. Holmquist*, 152 Ill. 581).

It is true that the question, whether or not the servant who has caused an injury and the servant who has received an injury are fellow-servants or not, is a question of fact to be determined by the jury. The definition of a fellow-servant is a question of law, but whether the person claimed to be a fellow-servant comes within the definition is a question of fact for the jury. The verdict of the jury upon the trial below, and the judgment of the trial court based upon that verdict, amount to a finding that the injury was not caused by the negligence of a fellow-servant. The judgment of the Appellate Court reverses the finding thus made by the jury, and substitutes therefor the finding of that court that the injury was caused by a fellow-servant. Such finding, however, made by the Appellate Court, is based upon the definition of

fellow-servant as embodied in the finding of facts made by the Appellate Court. The Appellate Court says that the injuries were occasioned by the negligence of a fellow-servant "directly co-operating with him in the particular business in hand and in the same line of employment in which the injuries were sustained." This definition of fellow-servant omits a qualifying clause which is essential to make the definition complete. It is a well settled rule in this State, that, when one servant is injured by the negligence of another servant, they are fellow-servants if, at the time of the injury, they are directly co-operating with each other in the particular business in hand in the same line of employment, or their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution. (*Chicago and Eastern Illinois Railroad Co. v. Kneirim*, *supra*, and cases cited therein; *Wenona Coal Co. v. Holmquist*, *supra*, and cases cited therein).

The clause: "so that they may exercise a mutual influence upon each other promotive of proper caution;" qualifies both of the preceding clauses which are separated by the disjunctive, "or." To be fellow-servants they must be directly co-operating with each other in the particular business in the same line of employment, so that they may exercise a mutual influence upon each other promotive of proper caution. (*Chicago and Alton Railroad Co. v. Swan*, 70 Ill. App. 331). That this is the proper construction of the definition, laid down in the books, of fellow-servants will appear from the reasons lying at the basis of that definition, as given in the case of *Chicago and Northwestern Railroad Co. v. Moranda*, 93 Ill. 302, which is the leading case in this State upon the subject of fellow-servants, and the foundation of all the subsequent decisions of the court upon that subject.

Co-operation means working together (*con* together and *opus* work). The two clauses draw a contrast between, or set over against each other, co-operation in a



particular business and habitual association in the performance of duties. But whether the co-operation is in a particular business in the same line of employment, or there is habitual association in the performance of duties, in either case the situation of the parties must be such that they may exercise a mutual influence upon each other promotive of proper caution. Persons can be directly co-operating with each other in a particular business in hand, and still not be in such a position that one could influence the other so as to make him cautious. Two persons may be directly co-operating with each other in running a train, as a brakeman on a train and as a train dispatcher, and yet they would not be regarded as fellow-servants because one cannot influence the other for caution. One is a superior servant to the other, or one is a vice-principal over the other. Two persons may be directly co-operating with each other in the particular business in hand, and not be near each other, or have anything to do with each other, as, for instance, one person may be running one train of cars on the Illinois Central railroad in the State of Louisiana, and another in the State of Iowa. While they would both be co-operating with each other in the particular business of running trains on one railroad, they would not be fellow-servants under the rule laid down in the Illinois cases.

The Appellate Court, in their finding of facts, make application of a faulty definition of fellow-servants. They find that the injury was caused by a person, who co-operated with the appellant in the particular business in hand and in the same line of employment, but not necessarily a person standing in such a relation to the appellant, that he and the appellant might exercise a mutual influence upon each other promotive of proper caution. Therefore, the finding of facts made by the Appellate Court upon the subject of fellow-servants is not only defective in not indicating whether or not the servant causing the injury was the station agent or the brakeman on

the freight train, but also in not applying a proper legal definition in order to determine the facts found.

In addition to what has been said, it cannot be doubted that the injury here was caused in part by the station agent who was not a fellow-servant. The station agent certainly contributed to the injury by not causing the switch to be closed, when he could have had it closed in time to prevent the injury. Consequently, even if the injury was caused in part by the brakeman on the freight train who left the switch open, there were two wrongdoers, one of whom was jointly liable with the other; and, under this state of facts, the defendant company was liable. Where the negligence of two independent persons results in injury to a third, when neither is sufficient in itself, both are to be treated in combination as the proximate cause of the injury. Where the negligent acts of two persons are, in combination, the proximate cause of the injury, either or both may be held responsible for the consequences resulting from their combined negligence. Where the negligence of the master is combined with the negligence of a fellow-servant in producing the injurious result, and neither is the efficient cause alone, the master as well as the fellow-servant is liable. In other words, where the negligence of the master, whether due to his own fault or that of his vice-principal, contributes to the injury, the servant is entitled to recover. (*Pullman Palace Car Co. v. Laack*, *supra*; *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481; *St. Louis Bridge Co. v. Miller*, 138 id. 465; *Village of Carterville v. Cook*, 129 id. 152). The Appellate Court, in view of the testimony in regard to the duties of the station agent, should have made a finding upon the question whether or not the negligence of the station agent contributed to the injury.

For the errors thus indicated I think that the judgment of the Appellate Court should be reversed, and that the judgment of the circuit court should be affirmed.

TERRE HAUTE AND INDIANAPOLIS RAILROAD CO. *et al.*  
*v.*

PEORIA AND PEKIN UNION RAILWAY COMPANY.

*Opinion filed October 19, 1899—Rehearing denied December 8, 1899.*

This case is controlled by the decision in *Terre Haute and Indianapolis Railroad Co. v. Peoria and Pekin Union Railway Co.* (*ante*, p. 501.)

*T. H. & I. R. R. Co. v. P. & P. U. Ry. Co.* 81 Ill. App. 455, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

JOHN G. WILLIAMS, (PAGE, WEAD & ROSS, and T. J. GOLDEN, of counsel,) for appellants.

STEVENS, HORTON & ABBOTT, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was an action in debt on a bond given to perfect an appeal from the judgment of the Appellate Court for the Second District, affirming a decree rendered in the circuit court of Peoria county dissolving an injunction and dismissing a bill in chancery filed by the appellant company against the appellee company.

The preceding case of this appellant company and others against the appellee company (*ante*, p. 501,) was an action in debt upon the appeal bond executed to perfect the appeal from same decree to said Appellate Court. The pleading, the facts and the questions involved are the same in the two cases. Upon the authority of the opinion filed in the former case the judgment herein is affirmed.

*Judgment affirmed.*

**GEORGE F. HARDING et al.***v.***THE AMERICAN GLUCOSE COMPANY et al.***Opinion filed October 19, 1899—Rehearing denied December 19, 1899.*

1. **APPEALS AND ERRORS**—*Supreme Court may consider testimony though decree pro confesso was entered.* Testimony taken on behalf of the complainants upon an issue of fact raised by the bill, answer and replication may be considered by the Supreme Court in passing upon the issues involved, although the answers were withdrawn and a decree *pro confesso* entered.

2. **SAME**—*when error will not justify remandment.* Error in sustaining a demurrer interposed by a party who has no interest in the controversy or as to whom the plaintiff consents the bill may be dismissed is not sufficient to justify a remandment of the cause for the purpose of allowing him to answer the bill.

3. **PRACTICE**—*when bill should not be dismissed for want of equity.* A bill sufficient on its face to justify the relief prayed for and sustained by proofs should not be dismissed for want of equity as to defendants, who, by their defaults, have confessed the bill.

4. **BANKS**—*option contract to sell manufacturing plant to banking corporation is void.* A banking corporation organized under the laws of Illinois has no power to purchase the plants and properties of manufacturing corporations, and option contracts providing for the sale of such properties to the bank are absolutely void.

5. **TRUSTS AND COMBINES**—*consolidation of corporations to create monopoly constitutes a "trust."* A trust is created where a majority of the stockholders in competing corporations consolidate their interests by conveying all their property to a corporation organized for the purpose of taking their property, when the necessary consequence of the combination is to control prices, limit production or suppress competition in such a way as to create a monopoly.

6. **SAME**—*public policy of Illinois is against "trusts" and combinations creating monopolies.* The public policy of the State of Illinois has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly.

7. **SAME**—*agreement to form illegal trust may rest upon verbal understanding.* An agreement to form an illegal combination or trust need not be embodied in writing, but may rest upon a verbal understanding evidenced by the acts of the parties.

8. **SAME**—*fact that prices may be reduced does not relieve a trust of its objectionable features.* A combination or trust which has power to raise the price of an article of merchandise at any time it sees fit to do so is not relieved of its objectionable features by the fact

182	551
184	380
182	551
f96a	*416
182	551
198	1*106
182	551
201	260
d187	0351
182	551
214	1*277
214	*449
214	*458
e113a	*606
114a	*99
114a	*106
114a	1*111
114a	457
114a	*688
182	551
215	1*458

that it may reduce prices, since the reduction may be made for the express purpose of crushing competition.

9. SAME—*parties forming illegal trust are guilty of conspiracy.* Parties who create and enter into a combination to regulate and fix the price of a manufactured product and limit the quantity produced or sold, are guilty, under section 1 of the act of 1891, on trusts and combines, (Laws of 1891, p. 206,) of a conspiracy to defraud.

10. CORPORATIONS—*corporation cannot perform strictly corporate acts outside the State of its creation.* A corporation, as a general rule, is without power to perform corporate acts, such as the holding of a stockholders' meeting, outside of the State of its creation and where the laws under which it was incorporated have no force.

11. SAME—*stockholder has a right to hold his investment in stock.* A stockholder has a right to hold his investment in the form of stock, and a change of such investment against his consent, by a sale of the property, is a change which affects his pecuniary interests, notwithstanding he is to receive his proportion of the proceeds.

12. SAME—*stockholder may enjoin sale of corporate property to "trust."* A stockholder, to protect himself from pecuniary injury, may, on behalf of himself and other stockholders, maintain a bill to enjoin a sale and transfer of the property of the corporation engaged in a profitable business to a trust organized to suppress competition and create a monopoly, where the wrongdoers comprise the officers and a majority of the stockholders.

13. SAME—*foreign corporations in Illinois are subject to local restrictions.* Foreign corporations are subject in the State of Illinois to the same restrictions and duties as domestic corporations, and have no other or greater powers.

14. SAME—*court may restrain a foreign corporation from transferring its local real estate to a "trust."* The courts have power to restrain a foreign corporation from transferring its property within the State, and consisting largely of real estate, to another foreign corporation, in violation of laws against trusts and combines.

15. CONTRACTS—*when a contract is void as in total restraint of trade.* A contract not to manufacture or sell glucose and grape sugar or by-products within a specified territory, within which, only, they can be manufactured successfully, is an agreement in total or general restraint of trade, and void.

16. PLEADING—*demurrer is overruled by answer to same part of bill.* A defendant cannot both answer and demur to the same part of a bill, and if he does so the demurrer is overruled by the answer.

17. LIS PENDENS—*a purchaser pendente lite is bound by the decree.* A purchaser *pendente lite* is bound by the decree rendered against the person from whom he derived title.

18. WITNESSES—*witness cannot base refusal to answer on alleged immateriality of testimony called for.* A witness cannot base his refusal

to answer a question which does not involve self-crimination or privileged communication, on the ground that it calls for immaterial testimony.

19. EVIDENCE—*party's improper refusal to answer must be considered against him.* A party's refusal to answer questions solely on the ground that immaterial testimony is called for must be considered against him, the same as any other refusal to produce evidence within the power of the witness.

WRIT OF ERROR to the Circuit Court of Peoria county;  
the Hon. LESLIE D. PUTERBAUGH, Judge, presiding.

This is a bill, filed on August 3, 1897, by the plaintiffs in error against the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, Joseph Firmenich, George Firmenich, C. H. Matthieson, F. O. Matthieson, and the officers, directors and stockholders of the American Glucose Company, and the unknown owners or holders of the option, given by the American Glucose Company for the sale of the plant in Peoria, and the unknown persons having any interest in such option or under it.

The complainants in the bill represent, that they were the owners of 203.5 shares of the capital stock of the American Glucose Company, a corporation organized under the laws of the State of New Jersey, with its general offices in Buffalo, New York, and office situate and plant and property operated in Peoria, Illinois; that such shares of stock are represented by a certificate issued to said Harding July 1, 1885; that the Chicago Real Estate Loan and Trust Company is the equitable owner of said stock as pledgee for the security of a loan, but that said Harding is the owner thereof, subject to the rights of said pledgee; that the capital stock of the American Glucose Company is \$1,500,000.00, the shares being \$100.00 each, but the original issue of said stock (of which the present certificate represents the reduced issue) made the said shares of said Harding 2035 in number and of the par value of \$203,500.00, instead of \$20,350.00; that

Harding paid in property \$203,500.00 for the original stock; that, by reason of these facts, orators became, and now are, the owners of one sixty-second part of the entire capital stock of the said American Glucose Company, if all of the stock had been issued, but about \$400,000.00 of it never was issued, but is owned by the corporation itself; that the American Glucose Company has, for many years past, been engaged in the manufacture and sale of glucose and grape sugar in Peoria; that the management during that period has been in the hands of the said Cicero J. Hamlin, late president, and his two sons, William and Harry Hamlin, and the board of directors have been and are now controlled by said Hamlin and sons; that your orators are unable to give a detailed statement of the management and administration of the affairs of the company, because the details thereof have been and are persistently, willfully and fraudulently concealed by the said Hamlins and their co-defendants from your orators; that the defendants have fraudulently manipulated and controlled the board of directors of said company, and conducted the affairs and business thereof fraudulently for their own interest and profit, and in gross disregard of the interests of your orators as stockholders, and have fraudulently paid, and still pay, enormous salaries to themselves and others in the business of said company, and, by these and other fraudulent expenditures and practices, have diverted to their own use the profits of said business, and prevented the payment to your orators of such dividends as they were entitled to receive; that, during that entire period, said Hamlins and said defendants have fraudulently controlled, and still fraudulently control, all the capital stock of said company, except that owned by your orators, and a few hundred dollars of stock owned by minority stockholders; that your orators file this bill not only in their own behalf, but also in behalf of all other stockholders similarly situated, who may see fit to come into this suit

and join therein; that said fraudulent salaries paid have been more than ten times the value of the services rendered, and said sums so diverted have amounted to the sum of \$100,000.00 a year during that period, and thereby your orators have been greatly defrauded and injured.

The bill further represents that a giant pool, trust, or combine has been recently formed for the purpose of unlawfully regulating and fixing the price of glucose and grape sugar, being articles of merchandise and commodities manufactured and sold throughout the United States and in this country.

The bill further proceeds as follows: "That the names of the persons forming such pool are now unknown to your orators, who have been unable, after diligent inquiry, to ascertain the same, but they are informed and believe and charge that all said defendants are parties thereto or interested therein, with others unknown; that said pool, trust and combine is to be accomplished through and in the form of a giant corporation, with many million dollars of capital stock, formed or to be formed under the laws of the State of New Jersey; that the parties organizing, creating, promoting and managing and interested in the said pool, trust and combine have recently perfected their arrangements, contracts and agreements for the purpose of unlawfully monopolizing, controlling, regulating and fixing the price of glucose and grape sugar within the State of Illinois and the United States, and for such purpose said parties have already obtained control of the factories and plants of nearly all the corporations and individuals heretofore engaged in the manufacture and sale of said commodities in the United States; that for the purpose aforesaid the said parties organizing said pool have made overtures to the board of directors of said American Glucose Company to secure the control of the plant and property of the said American Glucose Company situated and operated in Peoria and used in the manufacture of said commodities; that said Hamlin



and said other defendants, and the directors of said company whose names are unknown, and when known will be made parties, with said other stockholders unknown, have fraudulently promised and agreed with said parties forming said pool, for the fraudulent purpose aforesaid and in violation of the statutes of Illinois, to sell and transfer and convey to said parties forming said pool, or the corporation to be used as the instrument to carry into effect the said pool, all the plant and property of the said American Glucose Company hereafter more particularly described, situated and used in the said city of Peoria, without the consent of your orators, or either of them, and without the consent of any stockholders except the fraudulent stockholders aforesaid, or said directors, except the fraudulent directors completely under the control of the said Hamlins and interested with them; that the said Hamlins and the said other defendants, and said stockholders and directors, will convey and sell and transfer said plant and property unless enjoined from so doing by the order of court, and are now planning fraudulently, wrongfully and unlawfully, in violation of the statutes, and arranging to get the authority of the stockholders fraudulently for such sale, other than your orators and independent stockholders, and in violation and fraud of your orators' rights to the premises; that the purpose and intent of the said pool and combination, and of said defendants, jointly and severally, is to create a trust in and monopoly of the said articles, and give the said corporation, trust or pool the power to regulate and fix the price of such articles in the State of Illinois and elsewhere, and to control the entire output throughout the United States, amounting now, in the aggregate, to about one and one-quarter billion pounds annually, and consuming about 40,000,000 bushels of corn annually; that said pool and combine, and the effect, intent and purpose of it, and of the said defendants severally, is in direct violation of the laws of the State and statute, and

the method of said pool and combine, and of said parties forming and using the same or interested therein, is to swallow up and merge in this pool the organizations and plants in the United States heretofore engaged in the manufacture and sale of said articles, issuing to the said organizations heretofore engaged, stock in said pool and combine or in said trust or corporation, and where this method fails, to buy such other organizations and plants for cash; that on account of being unable to deal with your orators in the favorite method above referred to, the said pool and combine, and said parties creating the same, have resorted to the second method above referred to, so far as the American Glucose Company is concerned, and now propose and intend to thus fraudulently and unlawfully obtain the property and plant of said glucose company and the title and control of it, combining and conspiring with the Hamlins and directors and stockholders, and all the other defendants in this bill, for said purposes; and the said Hamlins, and said stockholders and directors and the said defendants, are actively, and knowingly and unlawfully, participating and joining in said fraudulent intent, and preparing fraudulently and unlawfully to sell the plant and property aforesaid to the persons and parties aforesaid for the fraudulent purposes aforesaid; that your orators are informed and believe, and so charge, that said pool, and said parties promoting the same, have unlawfully and wrongfully already purchased, for the purposes aforesaid, the Chicago Sugar Refinery, consuming about 26,000 bushels of corn daily in the manufacture of said articles; and the Peoria Grape Sugar Company, consuming about 15,000 bushels; and the Rockford Sugar Works, consuming about 16,000 bushels of corn daily; and the Davenport Sugar Refinery, consuming about 9000 bushels of corn daily; and the Firmenich Manufacturing Company, consuming about 9000 bushels of corn daily, in the manufacture of said glucose and by-products, and other factories heretofore engaged

therein, all consuming more than 100,000 bushels of corn daily in said manufacture; that C. H. Matthieson is one of the men engaged in forming said trust, with F. O. Matthieson, prominently connected with the American Sugar Trust, and the said sugar trust and the said glucose trust are intended by the said parties forming the same, to work together to control and regulate the price of grape sugar and glucose and all other sugar products, and the stockholders of said new pool and combine include all the stockholders of said American Glucose Company except your orators and the owners of a few other shares, powerless to prevent said wrongful sale and transfer without the aid of this court; that after diligent inquiry your orators have not been able to ascertain the price at which the plant and property of said American Glucose Company or pool is to be so sold and transferred to said pool, although they have repeatedly applied to the officers and directors of said company to learn the same and to the said defendants to ascertain the same, and they charge that such price has been wrongfully and fraudulently agreed upon at so small a sum as to be destructive of the value of your orators' said stock; and said Ham-lins, and said stockholders and directors and said defendants co-operating in the said fraudulent conspiracy, are to fraudulently receive, in addition, large sums as a bonus for such unlawful and fraudulent sale, to go to them individually, none of which will accrue to the benefit of your orators and the other stockholders of said company or to said company, and your orators, if possible, are to be frozen out and defrauded by the carrying out of said contract of sale, contrary to equity and good conscience and the statutes of this State; that there is now no occasion for the sale of the said plant and property in Peoria; that it ought not to be sold; that it is to the interest of the stockholders of said American Glucose Company, and of said company and of the public, that the said company continue to own and manage its property and plant,

and manufacture as heretofore; that such manufacture now is, and is becoming, exceedingly profitable, and all that prevents great profits and such continuance of ownership and conduct of business is said fraudulent conspiracy of said parties above named or referred to as defendants to this bill.

"Orators charge that Joseph Firmenich, C. H. Matthieson, F. O. Matthieson, George Firmenich, George W. Lamb, secretary of the said American Glucose Company, and Thomas Grant, and the officers, directors and stockholders of said company, are fraudulently co-operating and conspiring with and aiding the said Hamlins, and so are all the other parties defendant herein, and they control more than half the entire capital stock of said American Glucose Company, and will fraudulently sell and transfer to said trust said plant and property of the said American Glucose Company, to the great wrong and injury of your orators, unless restrained by the court; that the said Hamlins and the other directors of said American Glucose Company, if said plant and property be allowed to remain under the control of said Hamlins and of said company, will wreck and destroy it, and destroy the value of your orators' stock therein; that to prevent this a receiver should be appointed for the said American Glucose Company and its property, and the business of said company carried on by such receiver, under the directions of this court, until an accounting can be had in the premises and said company re-organized under the direction of this court, and its property and business preserved for its stockholders, and such other relief granted as may be proper in the premises; that all the acts of said defendants above referred to, and of the said pool and trust interested in the same, are with the fraudulent intent to effect a combination of capital, skill, and of firms and persons, to limit and reduce the production of glucose and grape sugar, and regulate and fix and control and change, at their will,

the price of the same, and to prevent competition in the manufacture and sale, and to make contracts by which all of said parties shall bind themselves not to sell the same below its price and to keep the price at a fixed figure, so as to prevent a free and unrestricted competition, in violation of the statute of Illinois entitled 'An act to define trusts and conspiracies against trade,' etc., approved June 20, 1893, in force July 1, 1893; that all the acts of said defendants and of said pool are with the fraudulent purpose to regulate and fix the price of said commodities, to limit the amount of manufacture; that the said articles, glucose and grape sugar, are not articles of merchandise the cost of which is mainly made up in wages, and the purpose and intent of said parties, or the principal object of or the effect of their said acts, are not to maintain or increase wages, all of which is in violation of the act to provide for the punishment of persons or corporations forming pools, approved June 11, 1891, and amended in 1897; and said acts of defendants are with the intent to place the management and control of such combination and pool, and the manufactured product, in the hands of a trustee or trustees, to limit and fix the price and lessen the production and sale of said articles, and to prevent the manufacture thereof except as controlled by them, in violation of said statutes of the State of Illinois; that the legal description of the real estate on which the said plant, machinery, etc., of said American Glucose Company is situated in Peoria, Illinois, and which real estate is a part of said plant, is a part of lot numbered 6, in Frink & Sanger's extended addition to the city of Peoria, etc., situated in the southwest quarter of section 17, etc.; that the glucose business is a business of enormous proportions, to which it has recently grown; that the manufacturers thereof now produce about forty pounds out of a bushel of corn; that it is a white, mobile, sweet syrup, weighing about twelve pounds to the gallon, with many properties and uses,

daily extended, of value and importance to the health and wealth of the country; that it formerly sold it at about seven cents per pound; that its price ruled, before the formation of said trust and pool and before its plans for incorporation, as low as seventy cents per one hundred pounds; that its products were and still are used everywhere, and their commercial importance and manifold by-products are outranked in few instances; that it is an important constituent for fine table syrups and used in every household, and in making jellies and jams, confectioners' jellies and brewers' glucose, in the manufacture of leather, dyes, and many medicines and candies, and in the manufacture of beers and wines and cordials, and it is an anhydrous sugar and of universal necessity, and its by-products are used in the manufacture of paints and are substituted for olive oil, and are used for food for horses, cattle and sheep, and from the residue is produced common meal from the hulls of corn, by grinding; that these are but the beginnings of its uses daily discovered and daily extended, beginning about 1867 at fifty bushels of corn per day, and now amounting to over 100,000 bushels per day, of which 60,000 bushels per day are used at home and 40,000 bushels are exported; that great skill and vast capital are employed in said business, making competition so great that the price of glucose has gradually worked down, but good profits and great fortunes have been and are still realized therefrom, and from the manufacture, and in the purchase of the plants, said new trust proposes to further increase the profits by limiting production and regulating prices and reducing operating expenses and cost of same,—all in violation of the letter and the spirit of the statutes of Illinois, and in various ways best known to other monster trusts of the same class in other industries; that it is not an easy matter for persons or corporations to go into this business, and this new proposed organization includes plants engaged in both glucose and grape sugar,

and that it requires considerable time to erect a plant, and some of the most important processes are patented and owned by the owners of the present plants, forbidding their use in new factories, and for the further reason that it requires special skill and experienced men to erect and operate a modern glucose plant which can compete at all with these great concerns, much less with this great proposed trust, and the proper class of men to operate same is limited in number and not easily obtained, and the best men are controlled by the owners of the present plants and will be controlled by the proposed trust; that the organizers and promoters of this proposed glucose trust propose and intend to stop competition and limit production and regulate and fix prices by closing up several of the plants which they have purchased or agreed to buy; that the effect of the destruction of competition in this business is already shown in the fact the price per hundred is now \$1.25, as against seventy cents per one hundred pounds two months ago, and by far the greater part of this gain of fifty-five cents was made within the few days past, and is due to the formation of this trust and to the shutting down, actual or expected, of the plants in the interest of the said trust, and the price, now nearly doubled, will still further advance, and is entirely within the control of this organization, which will control ninety-five per cent of the glucose plants of this country, and will practically destroy all competition and dictate prices; that the plants which are not yet in the new organization have agreed to fix the price as named by said proposed trust, which makes said trust absolute master of this mighty product of such vital importance to every class of men in the United States, and especially in this State, whose chief product is corn, and where many of the now competing plants to be swallowed up are situated; that the American Glucose Company is a corporation organized under the laws of New Jersey; that on inquiry from the officers of said company your

orators have learned that the president has given a cash option for the plant at Peoria, and has been informed that it has been accepted; that this option has been given to said proposed trust and that an acceptance has been given by this trust, as so stated, and that a special stockholders' meeting has been called, of which notice has been given your orators by printed notice, of which 'Exhibit A' attached is a copy, as follows, to-wit:

"The board of directors of the American Glucose Company, on this nineteenth day of July, 1897, declare and resolve that it is advisable that this corporation relinquish the business of manufacturing glucose and grape sugar, and such other business as it has hitherto engaged in at the city of Peoria and State of Illinois; that the nature of its business be changed accordingly; that the branch of its business at Peoria be relinquished, its manufacturing business be confined to the manufacture of starch at Buffalo, its plant and property at Peoria be sold, and that a meeting of the stockholders be called to meet in Buffalo on the third of August, 1897, at eleven o'clock, pursuant to the statute, to take action thereon.

GEORGE W. LAMB, *Sec.*'

"To this is attached, namely:

"You will please take notice that a meeting will be held at the office of the company in Buffalo on the third of August, 1897, for the purposes specified in such resolution.

July 18, 1897.

GEORGE W. LAMB, *Sec.*'

"Your orators further show that this proposition referred to in said 'Exhibit A,' to give up the business of manufacturing glucose and grape sugar and other business in Peoria and sell its plant, indicates the mode in which this new trust has planned and intends to control the glucose business of this country, and that for that purpose it intends to absorb the business of the American Glucose Company at Peoria, Illinois; that said American plant is one of the largest of the rival manufacturing plants of the country, consuming daily 26,000 bushels of corn—nearly one-third of the total manufacture of glucose and grape sugar and ninety per cent of the glucose and grape sugar manufactured in this State; and this



option and proposed purchase, now proposed to be fraudulently ratified by the stockholders on August 3, 1897, will practically destroy all competition in the manufacture of this most useful product in the State of Illinois, and will leave the new trust omnipotent in the markets of this State and Chicago, the largest and best in the world, and will destroy the property and business of said glucose company and irreparably injure your orators.

"Your orators charge that they have not been able to ascertain at what price the said option is given, although they have applied to learn at the office of the company and to its officers, but they are informed and believe that it is a price destructive to the value of the stock, and some contract exists by which the great sacrifice of this property is to be made good at the option of certain stockholders, not including your orators nor the minority not interested in said fraudulent conspiracy, but the benefits of said sacrifice will inure to the stockholders who are stockholders of the new trust, and that a scheme is adopted, or to be adopted, by which this pretended sale will effect a sacrifice of the interests of your orators in said property, for the benefit of other people and other stockholders, which is against equity and good conscience; that the country and people are now at the bottom of the panic, but business is rapidly improving and the price for which this plant is proposed to be sold is a panic price, which sale ought not to be made, and said American Glucose Company has no call nor necessity to make such sale, and its real interests are to continue in the manufacture of glucose in the business heretofore profitable to them and which cannot be less profitable than at present, and that by retaining the plant the said American Glucose Company will enjoy the enhanced price and share in the prosperity of this and all other business about to be realized; that negotiations were begun for the creation of this trust some time ago,—precisely when cannot now be ascertained by your orators because of

the secrecy observed by those engaged in the conspiracy against the public weal,—but your orators charge that the creation was within three months past, and negotiations for the purpose of secretly forming the trust began about that time with the said American Glucose Company, the plant of which at Peoria is regarded, and is, an essential element to the creation of such monopoly, without which no such trust could profitably be formed, and that at first, and up to a late date, the negotiations and organization had taken the shape of a union of the plants above described, and were and are intended to include the plant in Peoria of said American Glucose Company; that in whatever form they may be made to appear, the real organization and substance of said glucose trust is a union of said plants embracing all plants outside of said American Glucose Company and seeking to include said company and its plant in Peoria, but that for some unknown reason, believed to be because there was some outstanding stock, such as that of your orators, which it was necessary to get up, or the parties in charge of said negotiations on the part of said American Glucose Company were unwilling to have a full share in the profits that would accrue to the American Glucose Company by such organization given to said outstanding stockholders, that its officers, secretly conducting the said negotiations, have chosen said form of sale, and chosen that the first step should be uniting in said trust an ostensible sale of said plant at Peoria to said company, for cash; that in order that the trust might go forward, a price was named by the president for said plant and was accepted by said glucose trust; and your orators allege, upon information and belief, and allege as a fact so far as concerns themselves, that such price and all the details of said negotiations have been kept secret at all times and still are kept secret, especially from your orators, who have been unable, after much inquiry, to learn the truth; that your orators allege that they are informed

and believe that options are outstanding, given by said trust as a part of this sale to said Hamlin and the other defendants to this bill, to take said stock of said trust, giving a most favorable price and an option to take said stock in lieu of cash, greatly increasing the value of the stock of said preferred stockholders; that said stock in said trust company has been listed to the amount of forty millions of dollars, as your orators are informed and believe, upon the New York Stock Exchange, of which fourteen millions are preferred stock and the remainder is common stock; that said stock is now selling, as the market reports show, at 105 cents on the dollar offered for it, but offered on the exchange to be sold only at the sum of 115 cents on the dollar; that your orators cannot learn, after much inquiry, whether the deed for said plant has been prepared or executed or delivered in escrow, nor whether the call of said meeting on August 3 for said ratification is merely a form or whether this form precedes or succeeds the sale and conveyance to said trust, but allege, upon information and belief, that the deed has not yet been delivered, although prepared, and that the possession of the plant has not yet been delivered, although ready for delivery; that a time is fixed, August 10 or earlier, for such delivery; that payment has not yet been made; that the money for such payment lies in escrow in the hands of the Illinois Trust and Savings Bank of Chicago, and with it, as claimed, said deed; that the works of said plant at Peoria prepared to deliver it, have been closed down and shut up, and that the agents, managers and officers lately in charge are now absent, the office having been removed by the said conspirators ostensibly from Peoria to Buffalo; that they are now engaged in the necessary preliminaries for the performance of said contract, as made by said president, and a part of the officers are in Peoria engaged in preparing the plant for sale and delivery by direction of said Hamlin; that if any information or notice should be given to the

officers or defendants of any opposition to said sale or as to the filing of this bill, or of any application for an injunction, immediate delivery would be made in order to defeat said injunction; that the said 203 shares of stock of your orators, originally of the par value of \$203,500.00, and only cut down to avoid taxation, have cost and were of the original value to your orators of the sum of \$500,000.00; that by said sale, if carried out, the most valuable parts of the property and business of said American Glucose Company will be sacrificed, and your orators' stock will be reduced in value to less than one-twentieth of its cost, but if said property is retained and continued to be operated as heretofore, said stock, in the approaching prosperity now dawning upon the country, will enable your orators to realize a much larger per cent of the said value and re-pay the original cost of \$500,000.00, instead of the pitiful sum for which, under said alleged contract and fraudulent sale, it is now being sacrificed; that said plant at Peoria consists of buildings and appurtenances admirably fitted for the purpose of manufacturing glucose and grape sugar, and in all particulars is a modern plant; that it is situated upon the south-west quarter of section 17, in township 8, range north 8, in Peoria county, Illinois, and owned by said company, as accurately described elsewhere; that some of the stockholders of the American Glucose Company who have promoted this sale to the said trust are interested as beneficiaries in the trust, and as stockholders therein, obtained by them in part by the sale to said trust of parts or the whole of other factories, and that said stockholders of said American Glucose Company, under option given or understandings with said trust, will be able to realize larger returns than those which are claimed to be dividends, out of said sale or its proceeds to accrue to your orators.

"Your orators allege, upon information and belief, that said American Glucose Company has been conducted as

a private company under charge of the said Hamlins, and its proceeds, or the proceeds of its business, have been fraudulently and wrongfully diverted to the pockets of said Hamlins in divers and sundry ways, and amongst others in payment of enormous and fraudulent salaries to themselves and others interested with them, and in payments for contracts, corn, etc., or materials made by agents or other persons representing the dominating stockholders, and an accounting ought to be had in favor of your orators with said stockholders, consisting of the Hamlins and others, and the company, to ascertain the amount of moneys which your orators charge have been so abstracted, contrary to equity, from the treasury of said company, and of dividends so wrongfully paid, and your orators ask for an order referring the case to the master for the purpose of such action.

"Your orators further show that they fear and believe, and so charge, that the contract of sale between the American Glucose Company and the new trust has been carried so far that it may be possible to claim, on the part of the contracting parties, that the contract has been executed by the delivery of the deed in escrow, in which event your orators ask the relief that the trust shall not be permitted to enter into possession or use or operate the plant, and shall not be permitted to pay, nor the American Glucose Company to receive, any further sum or take any further action in performance of the said contract, by delivery of deed or by other action; that it is part of the said contract of sale, they are advised, that the American Glucose Company shall agree not to further continue the manufacture of glucose, and shall not use their factories elsewhere which can be used for such purpose, and thus promote the said trust; that the proposition sought by said conspirators to be ratified on August 3, 1897, to relinquish the manufacture of glucose at Peoria, or elsewhere, is a part of said contract, because said American Glucose Company prefers to dispose of

their plant for cash, in form, rather than take part in the formation of a new company, and to permit them to convert their cash received into stock or otherwise, by secret agreement, exclusive of your orators, the object of such trust in acquiring said plant at Peoria being well known to them; that the transaction, as proposed to be made by said American Glucose Company and said trust, is simply a mode of union of the glucose plants of the country after the manner of the Standard Oil Company, and will constitute a grand monopoly for the purpose of controlling, regulating and fixing the price of glucose and glucose by-products, syrup, and the sugar of the country, for the entire market of Illinois and the United States; and your orators pray that the stockholders be enjoined from ratifying said transactions and sale of said plant and such relinquishment of the manufacture on the third day of August, 1897, or taking any steps to aid in the creation of said trust or any other trust, or to ratify the offer or option for the sale of said plant; that all the other stockholders of the American Glucose Company, so far as known to your orators, and certainly the great majority, consisting of the Hamlins and family, and the Firmenichs, and others of like character or associated with them, regard themselves and are interested in the consummation of this sale for a consideration unknown to your orators, and believed to be outside consideration to be paid therefor, and so they and the officers and directors of the American Glucose Company are hostile to the interests of your orators and to the true interests of the stockholders, and are desirous of carrying out said sale and to make said deed and delivery of possession under said contract of sale, and it is worse than useless to ask said company or the directors and officers to file this bill or unite in it, or take the proper steps to defeat the action of the president, as shown by said option, now proposed to be ratified on August 3, 1897; that since said offer of sale of said plant, and since said price was made and

named by president Hamlin to said trust in said option, said plant has greatly increased in value, for the value of its products has doubled; for example, since July 1, 1897, the value of glucose has increased from seventy cents per hundred pounds to \$1.60 per hundred pounds, the lowest price for glucose being when said option was made and accepted; that said Hamlin had no right or power to offer said plant or to agree to the conditions of said offer, especially that the company should relinquish the manufacture of glucose and other by-products and grape sugar and withdraw from competition with said trust company, which said option contains; that the said proposed corporation of New Jersey, which is the said glucose trust aforesaid, has not, as yet, elected any president or other officers, and that said American Glucose Company is a corporation of New Jersey and incorporated under the laws thereof, although doing its business within this State, at Peoria, in the manufacture of glucose, which constitutes its main business, but its general offices, formerly at Peoria, have now been fraudulently removed to Buffalo and that said factory constituting said plant has been closed; that in some way, unknown to and concealed from your orators, the said American Glucose Company has by its officers obtained some contract, or options or understandings, permitting them to take stock in said trust company on terms that will give to them as a consideration of said plant, and so as to give them for their stock a consideration much greater than now proposed to be paid and to be given *pro rata* to your orators, for such price will only give your orators a dividend of one-twentieth of the cost of the said stock, and is a great sacrifice of your orators' interest in said property.

"To the end, therefore, that your orators may have equity in the premises, and that the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, Joseph Firmenich, George Firmenich, C. H. Matthieson, F. O. Matthieson, the officers, directors and stockholders

of the American Glucose Company, the unknown owners or holders of the option given by the president of the American Glucose Company for the sale of the plant in Peoria, the unknown persons having any interest in said option or under it, all of whom are made parties defendants, may be duly summoned to answer, (but not under oath, their oaths being waived,) that there may be an accounting under the order of the court, and that your orators may have decreed to them such dividends or sums as they may be found entitled to as stockholders, of said stock, and to the end that all of the said defendants and agents may be restrained and enjoined from closing up the business of manufacturing glucose and grape sugar, and such other business as said American Glucose Company has hitherto engaged in in the city of Peoria, and from changing the business and from relinquishing this branch of the business, and from carrying out in any way said option for sale or transfer of said property, or any part thereof, and from aiding or assisting any of the said acts, and from selling or transferring the said plant to any pool, trust or combine, or any association, corporation or individual, in violation of the laws of Illinois, or to any person or corporation or pool or trust or association, etc., to enable them to regulate or fix the price of glucose or grape sugar or by-products, or to fix the amount to be manufactured of same, and from any other violations of said acts of the General Assembly of Illinois approved June 11, 1891, and amended in 1897, and also act approved June 20, 1893, and that a receiver may be appointed of the said American Glucose Company to take charge of and protect and preserve its plant and property and manage same under the orders of this court, and that such injunction may be made perpetual, and to the end that your orators may have such other and further and different relief in the premises as equity may require."

This bill was sworn to, and the injunction writ was granted, as therein prayed. The summons and injunction



writ were served upon the American Glucose Company at Peoria on August 3, 1897, the day the bill was filed. Answers to the bill were at once filed by the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, and the officers, directors, and stockholders of the American Glucose Company (except the complainants in the bill). The solicitors for the defendants, who thus answered were, Frank D. Locke and Stevens, Horton & Abbott. On August 9, 1897, in vacation, a motion was made on behalf of the defendants, who thus answered by their solicitors, to dissolve the injunction on the answers and affidavits filed. On August 10, 1897, replications were filed by the complainants to all of said answers. On August 10, 1897, an affidavit by George F. Harding, and certain exhibits thereto were filed, and it was subsequently agreed by counsel that the said affidavit should be treated as a deposition. On the same day, August 10, 1897, the defendants, Joseph Firmenich and George Firmenich, demurred jointly and severally to the whole bill. The counsel, filing the demurrer for them, were Moran, Kraus & Mayer. On August 11, 1897, in vacation, the circuit judge dissolved the injunction; and, thereupon, counsel for the American Glucose Company, and the Hamlins and other defendants answering the bill, asked leave to file suggestion of damages. Such suggestion of damages, amounting to \$7000.00, was filed on August 13, 1897. Immediately upon the dissolution of the injunction on August 11, 1897, complainants below asked and obtained leave to amend the bill, and to make new parties defendants. Thereupon, on August 13, 1897, complainants filed an amendment to their bill by inserting the following:

"Upon information and belief the plaintiffs charge that the name of said pool, trust and combine so formed or to be formed is the Glucose Sugar Refining Company, a corporation under the laws of the State of New Jersey; that the said Illinois Trust and Savings Bank is in some way

connected with it and interested in said trust and formation thereof, and in said proposed sale and transfer of said plant and property and in said option; that they, the plaintiffs, allege against the said Glucose Sugar Refining Company and the Illinois Trust and Savings Bank, and each of them, all matters and things alleged in this bill against the other defendants hereto, or either of them, and that said bank has no right or authority, under its charter, to purchase or receive title to said property or any interest therein; that said American Glucose Company has no authority or power, nor its officers, directors or stockholders, to do any corporate act, or the proposed acts referred to in said 'Exhibit A,' nor all or any or either of them, at Buffalo, New York, because the same is beyond the limits of the State chartering said company, to-wit, New Jersey. By inserting on the next page of said bill, just after the words 'acceptance thereof and each of them,' the words, 'the Glucose Sugar Refining Company, a corporation under the laws of the State of New Jersey, and the Illinois Trust and Savings Bank, a corporation under the laws of the State of Illinois,' thus making the said last two named corporations defendants to said bill. By inserting in the prayer for summons in said bill the names of defendants, the Glucose Sugar Refining Company and the Illinois Trust and Savings Bank, as above described."

The Illinois Trust and Savings Bank, made defendant to the amended bill, was served on August 19, 1897, and on September 4, 1897, entered its appearance, and filed a general demurrer to the bill by its counsel, Wilson, Moore & McIlvaine, the senior member of the firm being John P. Wilson. On October 28, 1897, the Glucose Sugar Refining Company, made defendant by the amended bill, was served with summons by the sheriff of Peoria county, and on October 29, 1897, by the sheriff of Cook county. On November 17, 1897, the Glucose Sugar Refining Company by John P. Wilson, its solicitor, and Wilson, Moore

& McIlvaine, of counsel, filed a paper purporting to be a demurrer of said defendant to a part of the amended bill and a special answer to the residue thereof. This demurrer and answer in one is as follows:

"This defendant, to so much of complainants' amended bill as charges and sets forth the formation of a pool, trust or combine for the purpose of unlawfully regulating and fixing the price of glucose and grape sugar and of acquiring and purchasing factories and plants engaged in the manufacture and sale of glucose, and as charges that the board of directors of the American Glucose Company, Cicero J. Hamlin and sons, and any other of the defendants, have promised, arranged and agreed that the parties forming and controlling the said alleged pool, trust or combine, to sell, transfer, convey and set over to them, or to the corporation which is to be used by them to accomplish their said purpose, the plant and property of the said American Glucose Company in Peoria; and to so much of said amended bill as sets forth and charges that the purpose and intention of the said pool, trust or combine, and of defendants to said amended bill, is to create a trust in and monopoly of the articles manufactured at the plant of the said American Glucose Company in Peoria, and to give the corporation of such pool, trust or combine the power to regulate and fix the price of said articles and to control the entire output thereof in the State of Illinois and elsewhere, and that the method of the parties forming said pool has been and is to swallow up and merge in itself the organizations and plants heretofore engaged in the manufacture and sale of said articles, issuing to the latter stock of said pool or in such trust corporations, and where this method fails to buy such organizations for cash; and as to so much of the said bill as relates or sets forth each and every of the charges therein contained in relation to the formation of any pool, trust or combine by the defendants thereto, or any of them, for the purpose of securing a monopoly or

limiting the output or fixing or controlling the price of glucose or any other products heretofore manufactured at the plant of the said American Glucose Company in Peoria; and as to so much of said bill as relates to the purchase by said pool, or this defendant, of any other plant or property other than that owned by the American Glucose Company at Peoria; and as to so much of the said amended bill as relates to the purposes for which the proposed purchasers of said plant contracted to purchase the said plant, and to the use which is to be made of said plant by the said purchaser; and as to so much of the said amended bill as relates to the extent and character of the glucose business and of their by-products; and as to so much of said amended bill as prays for any relief based upon said parts of said bill, this defendant demurs, and for cause of demurrer shows that plaintiffs have not made such a case as entitles them to the relief prayed for, and prays judgment of the court as to such parts of the bill; and as to the residue of the bill this defendant for answer says, it has no knowledge or information as to whether the complainants own said stock, and leaves the complainants to make proof thereof; that it has no knowledge as to the value of the stock of the American Glucose Company, or the amount of its capital stock, or the cost thereof to complainants, and therefore leaves complainants to make proof thereof, and neither admits nor denies the same; that it has no knowledge regarding the management of the affairs of the American Glucose Company or relations thereto of the defendants Cicero J., William and Harry Hamlin, nor as to salaries or dividends, and therefore neither admits nor denies the allegations touching the same, but leaves the complainants to make proof thereof as they may be advised; that this defendant is a corporation duly organized under the laws of the State of New Jersey, for the purpose of and lawfully engaged in the business of manufacturing glucose and grape sugar and other products of corn, in Illi-

nois; that by its deed bearing date August 7, 1897, the American Glucose Company conveyed to Edwin L. Johnson its plant in Peoria, which deed was delivered August 11, 1897, recorded August 12, 1897, copy attached and made a part hereof, marked 'Exhibit A;' that said Johnson, by his deed bearing date the ninth of August, 1897, conveyed to defendant said plant, deed being delivered August 11, recorded August 12, copy attached, marked 'Exhibit B;' that at the date of the delivery of said deeds it paid for the premises so conveyed, in cash; that at the date of delivery of said deeds from the American Glucose Company to Johnson, and from Johnson to this defendant, purchase price was paid in cash to the American Glucose Company, the amount paid in cash on the eleventh of August being \$1,977,000.00, including personal property used with the said plant and conveyed by bill of sale to defendant by the American Glucose Company, and that immediately after delivery of said deeds defendant entered into possession of said plant and has ever since continued in possession, and has been operating said plant continuously in the manufacture of glucose and other products of corn; defendant denies that said Hamlins, or stockholders or directors or officers of the American Glucose Company, were on the thirteenth of August, 1897, or before, interested, as stockholders or otherwise, in this defendant corporation, or were interested in the organization or connected with it, or had any interest in the purchase except as stockholders and officers of said American Glucose Company; and denies that said Hamlins and other defendants, officers or directors of the American Glucose Company, have at any time confederated or conspired with any of the other defendants for the purpose of or in connection with the sale of the plant of the said American Glucose Company to this defendant, or any of the other defendants, except as officers of said glucose company; that it admits said American Glucose Company is a corporation organized

under the laws of New Jersey; that an option was given to purchase the plant at Peoria to the Illinois Trust and Savings Bank, which said option was afterwards duly assigned to Edwin L. Johnson, grantee of the deed from the American Glucose Company; admits that a special stockholders' meeting of the stockholders of the American Glucose Company was called, as alleged in said bill, but denies, on information and belief, that any option was given at any time to said Hamlins, or to any officers, directors or stockholders of the American Glucose Company, to take or receive any of the stock of this defendant at any price or upon any terms whatsoever, at any time; defendant denies, on information and belief, that any of the stockholders of the American Glucose Company have or will, directly or indirectly, receive any greater returns out of the said sale of the plant than a *pro rata* share of the price, or that any options or understandings have at any time existed between the officers or stockholders of the American Glucose Company with any other person or persons whatsoever, by means of which said officers and stockholders would derive any benefit from the said sale of said plant, other than through the distribution of the proceeds of said sale by the American Glucose Company between the stockholders, and denies that any collateral agreements have ever existed for the benefit of any stockholders in the American Glucose Company permitting them to convert their cash into stock, or otherwise participating in any benefits resulting from the sale of said plant not common to said complainants or of said stockholders; and denies that the American Glucose Company, or any of its officers, agents or directors, have at any time obtained any contract permitting them to take stock or to become interested or derive any benefits from the sale of said plant other than through the consideration paid in cash, or that they have any right to receive, or option to receive, any benefit or advantage, in any way, otherwise than through the cash con-

sideration and distribution to the stockholders; alleges that at a meeting of the stockholders of the American Glucose Company held at the city of Camden, in the State of New Jersey, on August 28, 1897, the stockholders of said corporation ratified and confirmed the action of the president and directors in selling the plant at Peoria, as hereinbefore stated, and voted to relinquish the business of manufacturing glucose and grape sugar in Peoria, and that its manufacturing business should be confined to the manufacture of starch at Buffalo, by a vote of two-thirds of the stockholders, and to reduce the capital stock from \$1,500,000.00 to \$150,000.00, and the stock actually issued from \$1,322,500.00 to \$132,250.00, and that the proceeds of the sale should be distributed among the stockholders *pro rata*, and that by an instrument signed by the owners of 12,590.4 shares of capital stock of said company out of a total number of said shares of stock outstanding of 13,225, each of said changes and action so held was ratified, and the action was duly certified to and filed with the Secretary of State of the State of New Jersey for the purpose of effecting the decrease of the capital stock and changes in the charter to said company, (a copy of which is attached as 'Exhibit C' and made a part hereof,) and by this action of said stockholders and officers the sale of said plant was duly and regularly ratified and confirmed and the changes in the charter and capital stock were regularly made, and denies that any other matter or thing in the said bill of complaint as amended, not hereinbefore demurred to or answered, is true."

"Exhibit A" referred to in the answer of the Glucose Sugar Refining Company is an indenture or deed, by which the American Glucose Company, for \$1,750,000.00, warrants to Edwin L. Johnson the plant in Peoria. It is dated August 7, 1897, and recorded August 12, 1897.

"Exhibit B" to said answer of the American Glucose Company is a deed from Johnson to the Glucose Sugar

Refining Company of said plant, granting to said trust said plant in Peoria in consideration of \$10.00 and other good and valuable considerations. It is dated August 9, and recorded August 12, 1897.

"Exhibit C" to said answer is a certificate of the American Glucose Company, by William Hamlin, as president, and Henry E. Grant, secretary, dated August 30, 1897, certifying that the company has reduced its authorized capital stock from \$1,500,000.00 to \$150,000.00, and its stock actually issued from \$1,322,500.00 to \$132,250.00, and has ratified the action of its stockholders at their meeting on August 3, 1897, to give up the business of glucose and such other business as it has been engaged in in Peoria, and that it has changed, accordingly, the nature of its business and given up its business in Peoria and confines its business to the manufacture of starch in Buffalo, and directed that its plant and property at Peoria be sold, and has ratified the action of the president and directors in selling the plant at Peoria to Edwin L. Johnson, of Chicago, and has authorized the distribution of the proceeds received from such sale among the stockholders, said changes having been declared by resolution of the board of directors to be advisable, and having been duly and regularly assented to by more than two-thirds of the stockholders at a meeting called by the board of directors to be held at Camden on August 28, 1897, and the written assent of said stockholders being hereto appended. This certificate was signed by the president and secretary on August 30, 1897, and to this certificate is appended a certificate by a notary public, William Johnson, that Grant swore to the above facts stated in said certificates, etc., and a certificate to this is appended of George Bingham, clerk of Erie county, New York, where said William Johnson purported to be a notary public, that Johnson was a notary public, etc., dated August 30, 1897. To this also is appended a ratification of the action by the stockholders at a meeting held on the third day



of August, 1897, declaring it advisable that the corporation relinquish the business of manufacturing glucose in Peoria and confine itself to the manufacture of starch at Buffalo, and that its plant and property at Peoria be sold, and also ratify the action of the president and board of directors in selling said property to Edwin L. Johnson, and giving assent to each and every one of such changes and to each and every one of the acts aforesaid, which paper is dated August 28, 1897, and purports to be signed by the holders of 12,590 shares of stock; and to this is appended the certificate of the Secretary of the State of New Jersey that the foregoing is a true copy of the certificate of decrease of the capital stock, etc., filed in the office on the third day of September, 1897.

Testimony was taken on behalf of the complainants in the bill before a notary public in Chicago at various times in the months of October and November and December, 1897, beginning on October 11, 1897, and ending on December 17, 1897. During this period, thirteen witnesses were examined on behalf of the complainants, and John P. Wilson and John S. Stevens appeared on behalf of defendants. In April and May, 1898, the depositions of three witnesses were taken on behalf of the defendants before a commissioner in Buffalo, New York; and these depositions were filed in the circuit court of Peoria county, June 1, 1898.

On June 6, 1898, the demurrers of the Illinois Trust and Savings Bank and of Joseph Firmenich and George Firmenich to the whole bill, and the demurrer of the Glucose Sugar Refining Company to a part of the bill, were sustained; and, thereupon, the complainants came and abided by their bill.

On June 21, 1898, the cause came on for hearing before the circuit judge, and it appeared that a *subpoena duces tecum* had been served on Conrad H. Matthieson, president of the Glucose Sugar Refining Company of New Jersey, to appear as a witness and produce the under-

writers' agreement of the Glucose Sugar Refining Company, and the option contracts for the sale to the bank by the six corporations above named of their respective properties, and other papers and books named in said subpoena, and all letters, records, and documents touching the organization of said Glucose Sugar Refining Company; said Matthieson did not appear, and, thereupon, the complainants moved for an attachment against him; whereupon attorneys for the defendants resisted said motion. In the course of the argument on said motion, Stevens, Horton & Abbott moved for leave to withdraw the answers filed by that firm for the American Glucose Company, the Hamlins, and all the officers, directors, and stockholders of the American Glucose Company (other than complainants,) and to withdraw their appearance for said defendants. Complainants objected to this motion, but the court allowed it; and, thereupon, the following order was entered, on June 22, 1898, to which date the hearing had been adjourned from June 21, 1898, to-wit:

"Now come the parties herein by their respective solicitors, and on motion of Stevens, Horton & Abbott as solicitors for the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, and directors of said company and the stockholders of said company (other than defendants herein,) leave is hereby given said defendants to withdraw their answers herein, and the same being done, it is hereby ordered that the bill of complaint, as herein amended, be and the same is hereby taken as confessed by said defendants and every of them, and on motion of said attorneys, Stevens, Horton & Abbott, their appearance as solicitors for said defendants is hereby withdrawn, and the appearance of said firm is hereby entered as one of the solicitors for the defendant herein, the Glucose Sugar Refining Company."

The motion of the complainants for an attachment was then further argued, but said attorneys for defendants claimed that no evidence from said Matthieson was

then required, as the truth of the allegations of the bill was admitted by their demurrer, and by the decree *pro confesso* entered. John P. Wilson then stated to the court that the said Matthieson would attend on the next morning as a witness. Matthieson produced in court from his possession the option contracts or agreements between the Illinois Trust and Savings Bank and the Peoria Grape Sugar Company, and between the bank and the Rockford Sugar Refining Company, and between the bank and the American Preservers' Company, and between the bank and the Firmenich Manufacturing Company, but stated that the option contract with the Chicago Sugar Refining Company was not among the papers, and that he did not know where it was. Counsel for complainants offered the option contracts in evidence for the purpose of showing, that the transaction of the American Glucose Company was part of the same transaction of five other corporations, and was all one. Wilson refused to allow counsel for complainants to see the option contracts unless the court should so order, and, when the court decided that the counsel of complainants had a right to inspect the contracts, Wilson announced that he would send the books and papers out of the court room, and handed the same to his assistant, with instructions to take them from the court room. Thereupon, the court, after an inspection of the contracts by the court, decided that the contracts were not material, but held that they might be inserted in the record, and shown by the record. The court refused to allow counsel for complainants to inquire of Matthieson, the witness, what had become of the absent contract with the Chicago Sugar Refining Company. Counsel for the complainants exhibited to the witness certain copies of deeds from the Chicago Sugar Refining Company to Edwin L. Johnson, and from said Johnson to the Glucose Sugar Refining Company, dated respectively August 7 and 9, 1897, and inquired of the witness what he had had to do with the execution and delivery of

the deeds, with a view of showing the price at which the plant of the Chicago Sugar Refining Company had been sold, to-wit, \$6,250,000.00, and for the purpose of showing that the sale took place as a part of the same transaction, which involved a sale of the plant of the American Glucose Company; but the court refused to allow the witness to testify upon the matters thus inquired about. Counsel for complainants also offered in evidence, with the several option contracts, certain assignments attached thereto, showing assignments of said contracts by the bank, the vendee therein, to Edwin L. Johnson; but the court refused to admit said assignments, and also refused to admit in evidence certified copies of said deeds.

The court, upon objection by Wilson that the evidence was incompetent and immaterial, refused to allow the witness, Matthieson, to state where the money came from to pay the Chicago Sugar Refining Company for its plant, or to state whether or not the money was that of the Illinois Trust and Savings Bank, or of Johnson, the grantee in the deed, or of the Glucose Sugar Refining Company; or to state how many deeds he received for the plants of the six corporations, as president of the Glucose Sugar Refining Company on August 11 and 12, 1897; or whether the transactions on August 11 and 12, 1897, with the six corporations, were carried out in his presence at the same time or not. The court, also, upon similar objections by Wilson, refused to allow the witness to state, in answer to questions by counsel for appellants, whether it was the understanding and agreement by the six corporations with the Glucose Sugar Refining Company that the conveyances and sales were to be carried out at the same time; or whether the properties were first deeded to Johnson, and then by Johnson to the Glucose Sugar Refining Company; or whether the six plants described in the option contracts are now in the possession of the Glucose Sugar Refining Company; or whether witness was in the management and control of the six corpora-

tions, as president of the Glucose Sugar Refining Company; or why the option contracts were taken to the Illinois Trust and Savings Bank for the sale of the plants of the six corporations; or whether the witness or his company fixed the price for glucose in the Chicago market, or the price at which the products of these six plants were sold in Chicago and elsewhere; or what was the price of glucose on April 1, 1897, on May 19, 1897, on June 9, 1897, on August 3, 1897; or whether the six plants in question had been competitors in the sale of glucose; or whether or not any stock of the Glucose Sugar Refining Company was used to buy either of the six plants; or whether or not the money to pay for the plant of the American Glucose Refining Company was obtained from subscriptions under the underwriters' agreement in New York; or the price at which the several plants were bought by the Glucose Sugar Refining Company; or how the price, at which the several plants as described in the several option contracts were bought, was paid, whether in money or in stock; or whether the proceeds of the underwriters' agreement were ever given to Edwin L. Johnson, or ever used by him to pay for the several plants; or whether the money paid for the American Glucose plant was received from Johnson; or what dividends had been paid by the Glucose Sugar Refining Company; or whether the Glucose Sugar Refining Company sold its glucose with reference to rebates; or whether the said company had a rebate agreement. The witness was then shown a paper over the signature of the Glucose Sugar Refining Company, dated September 23, 1897, addressed "to the trade," and stating: "You are hereby notified that on and after September 27, 1897, a rebate of one-quarter per cent per pound will be paid six months after purchase to all buyers of glucose and grape sugar, who shall comply with the terms of purchase, and who shall buy glucose and grape sugar exclusively of the Glucose Sugar Refining Company. A memorandum voucher will be furnished

each customer entitled to said rebate, and his certificate, stating that he has complied with the conditions governing said rebate, will be required." But the witness was not allowed to state whether his company had issued to the trade the paper shown to him; or to state whether, as president of the Glucose Sugar Refining Company, he had received, and had on hand out of these rebates, a sum approximating \$1,000,000.00, so as to control the parties dealing in glucose, and compel them to buy of his company; or whether or not any part of the purchase price of the six plants was paid in the stock of the Glucose Sugar Refining Company, either to the corporation, or to the stockholders of the old corporation.

After hearing had upon the evidence taken, as aforesaid the court, on June 23, 1898, decreed that the bill, as amended, should be dismissed for want of equity.

The present writ of error is sued out for the purpose of reviewing the decree of the circuit court which so dismissed the amended bill for want of equity.

**WILLIAM J. AMMEN**, for plaintiffs in error:

Combining the management of five coal companies under one committee has been held in contravention of public policy and illegal and void. *Morris Run Coal Co. v. Buckley Coal Co.* 68 Pa. St. 173.

A corporation organized for controlling the manufacture and sale of matches, its object being to stifle competition and engross the whole business of the country in that line, is an unlawful combination and contrary to public policy. *Richardson v. Buhl*, 77 Mich. 632.

A contract by which a corporation, with others, agrees to transfer all its property to a new corporation for the purpose of controlling the selling of a certain article, is void. *Merz. Cop. Co. v. U. S. Cop. Co.* 67 Fed. Rep. 415.

Any combination is a monopoly the tendency of which is to prevent competition in its broad sense, and thus enhance prices. *People v. Sugar Refining Co.* 3 N. Y. Supp. 401.

In Illinois the legislature has declared its policy by the anti-trust and anti-monopoly statutes. It is for the court to construe these statutes as applicable to the case at bar and give effect thereto.

A combination the tendency of which is to prevent general competition and to control prices is detrimental to the public, and unlawful. Spelling on Trusts, 77.

Any contract between two or more persons or corporations affecting any article or commodity of which the public must have a sufficient supply, the tendency of which contract is the creation of a scarcity or enhancement of prices, will be held unlawful by the courts. Spelling on Trusts, 77, 76.

MORAN, KRAUS & MAYER, for defendants in error Joseph Firmenich and George Firmenich:

The bill does not show that a trust or monopoly contrary to statutory prohibitions was established or contemplated. The act of 1891 does not apply, because there was no allegation or proof of a combination to fix prices or to limit production, as is required by that act. *Coquard v. Linseed Oil Co.* 171 Ill. 480.

Complainants cannot attack the sale on the ground of public policy or to enforce the laws of the State. *Coquard v. Linseed Oil Co.* 171 Ill. 480; *Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; *Railway Co. v. Steamship Co.* 86 Fed. Rep. 407; *Greer v. Stoller*, 77 id. 1; *Cope v. Fair Ass.* 99 Ill. 489; *Kerfoot v. People*, 41 Ill. App. 409; *World's Columbian Exposition v. United States*, 56 Fed. Rep. 654.

That the sale was made to an alleged trust was no ground for relief, because the sale was not an *ultra vires* act. It was expressly authorized by the statutes of New Jersey. These statutes became a part of complainant's contract as stockholder. Laws of N. J. 1896, secs. 27, 28, chap. 185; *Branch v. Jessup*, 106 U. S. 468; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320; *Wallace v. Publishing Co.* 101 Iowa, 313; *Lauman v. L. & R. Co.* 30 Pa. St. 42; *Peabody v.*

*Westerly Water-works*, 37 Atl. Rep. 807; *Meredith v. New Jersey Zinc Co.* 55 N. J. Eq. 211.

The courts of this State will not attempt to control a foreign corporation as to a matter touching the management of its affairs or the exercise of its charter powers. Such proceeding must be instituted in the courts of the domicile of the corporation. This has been held to be the law in cases like the present. *Mining Co. v. Field*, 64 Md. 154; *Madden v. Electric Light Co.* 181 Pa. St. 617; *Leavy v. Columbia River Co.* 82 Fed. Rep. 775; *Gregory v. Railroad Co.* 40 N. J. Eq. 38; *Howell v. Railroad Co.* 51 Barb. 378; *Railroad Co. v. Railroad Co.* 131 Mass. 34.

WILSON, MOORE & MCILVAINE, for defendant in error the Glucose Sugar Refining Company:

The only question before this court is whether the demurrer of the Glucose Sugar Refining Company was properly sustained. This involves only a consideration of the allegations and the law applicable thereto. No evidence was admissible in support of these allegations, to which the demurrer had been sustained. The question is one absolutely of law upon the allegations admitted by the demurrer. *Morawetz on Corp.* sec. 271; *Pomeroy's Eq. Jur.* secs. 1090, 1094, 1095; *Porter v. Railroad Co.* 76 Ill. 566; *Tracy v. Talmadge*, 114 N. Y. 162.

A stockholder can only file a bill to prevent the corporation disposing of its property upon grounds that will affect his pecuniary interests. His right to maintain such a bill grows out of its necessity to protect his property right, and to maintain it it must be shown that it is necessary to protect himself from pecuniary loss or injury. When a corporation sells its property, the only interest which a stockholder has in the sale is that the property shall be sold for a fair price and that the proceeds of the sale be divided *pro rata* among the stockholders. The stockholder does not represent the public, and cannot maintain a bill to protect the public interest or to pre-



vent a violation of law which affects him only individually. *Cope v. Fair Ass.* 99 Ill. 492; *Bank v. Byram*, 131 id. 100; *Springer v. Walters*, 139 id. 422; *Hawes v. Oakland*, 104 U. S. 450; *Foster v. Mansfield*, 36 Fed. Rep. 628; *Huntington v. Palmer*, 104 U. S. 482; *Greenwood v. Railroad Co.* 105 id. 13.

Knowledge that property is intended to be used for an illegal purpose does not vitiate a sale. *Tracy v. Talmadge*, 114 N. Y. 162.

MR. JUSTICE MAGRUDER delivered the opinion of the court:

The bill in this case is filed by a stockholder in the American Glucose Company, a corporation organized under the laws of New Jersey, but doing business and owning property at Peoria, in Illinois. The stockholder, who files the bill, is a citizen of Illinois. The American Glucose Company owned a plant, consisting of real estate together with the buildings and machinery located thereon, and also personal property, in the city of Peoria in Illinois. The land, upon which the plant is situated, is specifically described in the bill. The primary object of the bill, and the chief relief sought by it, are to prevent the officers and directors of the American Glucose Company from selling and disposing of its plant in Peoria, and from closing out the business, in which it is there engaged, of manufacturing glucose and grape sugar.

The bill charges, that the officers and directors of the corporation have been squandering its assets by diverting the profits made in its business to their own use; and that, in further consummation of their fraudulent disposition of the property of the company, they are about to make a sale of the manufacturing plant in Peoria to a new corporation organized under the laws of New Jersey, and to give up and abandon the business of the company as theretofore conducted in Peoria.

The bill further charges, that not only is the American Glucose Company about to make a sale of its plant

to the new corporation, but that five other corporations, engaged in the same business of manufacturing glucose and grape sugar, are about to make sales of their respective plants to the same newly organized corporation; that all of said sales constitute one transaction, and that the sale of the American Glucose Company is merely a part of that transaction.

It is charged in the bill that the arrangement, by which the proposed new corporation is to take conveyances of all these plants, constitutes a giant pool, trust, or combine, formed for the purpose of regulating, fixing, and controlling the prices of glucose and grape sugar, and of suppressing competition in the manufacture thereof, and of creating a monopoly therein.

*First*—Shortly after the filing of the bill on August 3, 1897, the American Glucose Company and William Hamlin, president thereof, and Cicero J. Hamlin and Harry Hamlin, directors and officers thereof, and all other directors and officers and stockholders thereof (except appellants), filed their answers to the bill. These answers were subsequently withdrawn, but not until June 22, 1898, while the cause was on hearing before the circuit court. Replications were filed to these answers, and an issue of fact was thus made up upon the allegations of the bill, which set up the formation of an illegal trust or combine. Upon the issue of fact as to the purchases of the plants of other corporations than the American Glucose Company with a view of forming an illegal trust and crushing out competition and creating a monopoly in the manufacture of glucose and grape sugar, testimony was taken on behalf of the complainants in the bill. We are unable to see why the consideration of the facts as developed by this testimony is not necessarily involved in the decision of this case by this court, notwithstanding the insistence by one of the counsel for defendants in error in his brief, that "no discussion of any evidence, or pretended evidence, in relation thereto is proper in this court."

It is true, that, upon the hearing of the cause, the American Glucose Company and its officers and directors and majority stockholders withdrew their answers, and permitted a default and decree *pro confesso* to be entered against them. This action on their part was a confession of the truth of all the allegations of the bill, which they had answered and put at issue. But the proof, taken in support of those allegations, was not thereby necessarily withdrawn from the consideration of the court in passing upon the issues involved in the case. Section 18 of the Chancery act provides that, "where a bill is taken for confessed, the court, before a final decree is made, if deemed requisite, may require the complainant to produce documents and witnesses to prove the allegations of his bill, or may examine him on oath or affirmation, touching the facts therein alleged. Such decree shall be made in either case as the court shall consider equitable and proper." (1 Starr & Curtis' Stat. chap. 22, p. 401). Here, the court did not require the complainants below to introduce proof to sustain the allegations of their bill, but the complainants had the right, even before issue joined, to take depositions to substantiate the averments of their bill. (*Doyle v. Wiley*, 15 Ill. 576). Certainly, they had a right to do so, after issue was joined. It being a matter of discretion with the court, even after default, to require proofs of the averments of the bill, it may be, that, if the complainants, on being required by the court to do so, should fail to comply, their bill might be properly dismissed for want of such proofs. But the general rule is that, where a bill is sufficient on its face to sustain the contention of the complainants therein, and to entitle them to the relief prayed for, a decree dismissing the bill for want of equity should not be entered in favor of defendants, who, by their defaults, have confessed the bill. (*Hoffman v. Schoyer*, 143 Ill. 598). In the present case, the court below dismissed the bill as to the defaulted defendants, as well as to the other defendants. This action

of the court was, in our opinion, erroneous, not only because the bill was sufficient to justify the relief prayed for, but because its material allegations were sustained by the proofs. This proof was clearly applicable to the actions, taken in the premises by the American Glucose Company and its officers and directors and majority stockholders, who answered the bill. Whether such proof is binding upon the Glucose Sugar Refining Company, holding from and under the American Glucose Company, will be considered hereafter.

As, therefore, the proof is before us in the record, and the case is one of great importance, we deem it our duty, before discussing the questions of law arising out of the demurrer or demurrers to the whole bill or to parts thereof, to examine the testimony upon the issue of fact made by the answers filed.

In the spring of 1897 six corporations were engaged in the manufacture of glucose, two of them in the State of Iowa, and four of them in the State of Illinois. They were the Chicago Sugar Refining Company, operating in the city of Chicago; the American Glucose Company, operating in the city of Peoria; the Peoria Grape Sugar Company, also operating in the city of Peoria; the Rockford Sugar Refining Company, operating in Rockford, Illinois; the American Preservers' Company, otherwise spoken of as the Davenport Sugar Refining Company, operating at Davenport, Iowa; and the Firmenich Manufacturing Company, operating at Marshalltown, Iowa. There was another manufactory of glucose at St. Charles, Illinois, known as the St. Charles Glucose Company, operated by one Charles Pope, of St. Charles and Chicago. Pope refused to enter the combination hereinafter mentioned at the outset, and is spoken of by some of the witnesses as an "awkward" competitor. The Pope manufactory, however, was of small capacity compared with the others. All of these corporations, thus engaged in the manufacture of glucose and grape sugar, were com-

petitors with each other in that business. The proof shows, that glucose cannot be successfully manufactured, except in what is known as the corn belt of the United States, including the States of Illinois, Iowa, Kansas, Missouri, and parts of Nebraska, South Dakota, Kentucky, and Indiana. The corn belt constitutes an ellipse of about 950 miles in length from east to west and about 700 miles in width, with Peoria as the geographical center, and all within a thousand miles of Chicago. The products of glucose are extensively used; and it is an important constituent in the matter of making table syrups, jellies, and jams, and is also used in the manufacture of beers and wines and cordials. The manufactories, as above named, consumed a little more than 100,000 bushels of corn daily in the manufacture of their products. The American Glucose Company consumed daily about 26,000 bushels of corn; the Chicago Sugar Refining Company consumed in said manufacture about 26,000 bushels of corn daily; the Peoria Grape Sugar Company, which was, however, slightly crippled by a fire consuming part of its plant, consumed therein about 15,000 bushels of corn daily; the Rockford Sugar Refining Company consumed about 16,000 bushels of corn daily; the Davenport Sugar Refining Company, or the American Preservers' Company, consumed about 9000 bushels of corn daily; and the Firmenich Manufacturing Company consumed about 9000 bushels of corn daily. The capacity of the Pope Manufacturing Company was about 6000 or 7000 bushels of corn daily.

Some time in May, 1897, as nearly as we can gather from the record, a scheme was formed for the purpose of uniting all these corporations in one ownership. The plants, including both real and personal property, so far as they were engaged in the manufacture of glucose and grape sugar, were to be transferred by these corporations respectively to a new corporation to be organized under the laws of New Jersey. Such corporation was not or-

ganized completely until August 2, 1897. Its charter, or certificate of organization, bears date August 2, 1897, though it would appear that it did not go into practical operation until August 3, 1897, or shortly thereafter. The parties, who were engaged in forming, promoting, carrying out, and consummating the scheme for the consolidation of the property interests of all of said corporations, were principally the officers, directors, attorneys, and majority stockholders in the old corporations respectively. Nearly all of them, if not all of them, were citizens of Illinois. The principal persons engaged in forming and consummating this consolidation, were Norman B. Ream, and John W. Doane, who were largely interested in the Rockford company above mentioned; William Hamlin, the president of the American Glucose Company; Conrad H. Matthieson of the Chicago Sugar Refining Company; two Chicago lawyers, named John P. Wilson and Levy Mayer, Wilson being also a stockholder in the Chicago Sugar Refining Company; William H. Henkel, secretary of the Illinois Trust and Savings Bank of Chicago; and one J. B. Greenhut. Norman B. Ream was a director in the Illinois Trust and Savings Bank of Chicago. Between the early part of May, 1897, and August 11 or 12, 1897, all the plants above mentioned, except that of Pope, belonging to the six corporations hereinbefore described, were transferred to the Glucose Sugar Refining Company of New Jersey; and said plants since August 12, 1897, have been in the possession of and operated by the Glucose Sugar Refining Company of New Jersey. After August 7, 1897, they ceased to be operated by the respective corporations theretofore owning them. As we understand the evidence, these six corporations were, with the exception of the Pope manufactory at St. Charles, Illinois, the only manufactories engaged in the manufacture and sale of glucose and grape sugar within the limits of the corn belt already described. The negotiations and transactions, leading to the result thus accomplished, were

conducted secretly and with great caution. The organization of the new corporation, which was to be vested with the title to the plants, was deferred until the last moment, and was not consummated until the day before, or the day on which, the present bill was filed.

The general method, adopted for the consolidation of these properties, was substantially as follows: Option contracts were drawn up, one for each of the corporations already mentioned. By the terms of these option contracts, which were made between each of said corporations on the one part, and the Illinois Trust and Savings Bank of Chicago on the other, the corporation agreed to sell all its real and personal property and plant and leaseholds, machinery, easements, buildings, fixtures, and utensils, located at the place at which it was engaged in the manufacture of glucose, together with its good will, trade rights, trade-marks, and the right to use its patents, to the bank upon the request of the bank, or its transferee, provided such request should be made before August 15, 1897. The option contract between the Firmenich Manufacturing Company of Iowa and the Illinois Trust and Savings Bank of Chicago was dated May 24, 1897; the contract between the Rockford Sugar Refining Company, Limited, of Illinois and the bank was dated May 25, 1897; the contract between the Chicago Sugar Refining Company of Illinois and the bank, and that between the Peoria Grape Sugar Company, and the bank, were dated June 7, 1897; there are two contracts between the American Preservers' Company of West Virginia and the bank, one dated June 3, 1897, and the other dated July 19, 1897, the latter recited to be a substitute for the former; the second contract between the American Glucose Company of New Jersey and the bank was dated June 9, 1897. Some of these contracts state, that a part of the purchase money for the plant and property to be sold is to be paid in the stock of a corporation with a capital stock of \$40,000,000.00 of which \$14,000,000.00

is to be preferred stock, and \$26,000,000.00 common stock, which said corporation is about to be organized and to acquire said property, and also the properties specified in the contracts made between the five other corporations and the bank. Some of these contracts provide, that the bank may pay for the property at its option in the stock of the new corporation to be formed, instead of cash. The contracts also contain a provision, by the terms of which the vendor corporation and its officers agree not to buy or sell or manufacture glucose, or its kindred products or by-products, for a certain term of years within a thousand miles of Chicago, the said term of years being three years in some instances, and twenty-five years in at least one instance. The defendant in error, the Glucose Sugar Refining Company of New Jersey, a corporation which was to be organized according to the terms of these option contracts, and which was finally organized as above stated, is a corporation, whose certificate of organization provides, that it shall have power to conduct business throughout the United States and all foreign countries with the object of manufacturing and selling glucose, and buying and selling corn and all its products and by-products and similar articles of merchandise, and to transport the same, and to do all lawful business incidental thereto; and said certificate further provides, that the total amount of the stock shall be \$40,000,000.00 of \$100.00 per share, \$14,000,000.00 to be preferred stock, and \$26,000,000.00 common stock, etc.

The first option contract, made between the defendant in error, the American Glucose Company, and the Illinois Trust and Savings Bank, was dated May 19, 1897. Thereby, the American Glucose Company agreed to sell to the bank its plant, etc., for \$1,750,000.00, one-third in cash, and the balance to be paid by notes secured by mortgage on the property; it further provides, that "it is the purpose of the bank, or of those for whom it acts, to organize a corporation under the laws of one of the States of the



Union for the purpose of operating this plant." The contract of May 19 further provides, that an exhibit of the new corporation and its means shall be made to the president of the American Glucose Company, and then proceeds as follows: "If he (said president) be satisfied with the nature and extent of the property so owned, or if it be the property, which has been verbally stated to him will be acquired by such corporation, then \$600,000.00 in amount at par of the preferred stock of such corporation, out of a total issue not exceeding \$14,000,000.00, and \$850,000.00 in amount at par in the common stock of such corporation, out of a total issue not exceeding \$26,000,000.00, shall be lodged with such president, and this stock shall be held as an additional collateral security for the payment of such notes and each thereof," etc. This agreement of May 19 also provides, that the bank is to purchase all the supplies and material on hand belonging to the American Glucose Company, and is to assume all the *bona fide* contracts made by the company in due course of business. It also provides, that the company and its officers and directors, including the Hamlins, shall bind themselves to the corporation not to buy or sell glucose within a thousand miles of Chicago. An unsigned copy of this contract is in the record. The contract of May 19, 1897, was not signed by the bank, and it is claimed by William Hamlin, the president of the American Glucose Company, that it was not signed by that company. We think, however, that it was signed by the American Glucose Company, as it was originally drawn. A new option contract for the sale of its property to the bank, bearing date June 9, 1897, was executed by the American Glucose Company by William H. Hamlin, its president, as a substitute, as is alleged, for the contract of May 19, 1897; and it makes the following recital in the eleventh paragraph, to-wit: "This agreement is in lieu of and in substitution for a certain other option, bearing date the 19th day of May last, *which was executed by the glucose company,*

running to the bank, and which was delivered to J. B. Greenhut," etc.

The option agreement of June 9, 1897, fixes the price of the realty of the American Glucose Company at \$1,-750,000.00, and its section 6 provides, that the American Glucose Company and the Hamlins are not to make or buy or sell glucose for five years within a thousand miles of Chicago.

The agreement of June 9, 1897, is claimed by plaintiffs in error to be a contract of sale to the bank of the property of the American Glucose Company for cash, and it is contended that all the provisions for the taking of stock in the new corporation to be organized, either as purchase money, or as collateral to notes given as purchase money, were eliminated. The evidence certainly shows, that many of the officers and stockholders in the corporations, which sold their plants to the new corporation, held stock in the latter after the transfer of the plants to it. William Hamlin and Harry Hamlin both held stock in the Glucose Sugar Refining Company at a date subsequent to the delivery of the deed, which conveyed to that company the plant of the American Glucose Company. It is a fair conclusion from the testimony, that the purchases of many of the six plants were paid for, either in whole or in part, by the stock of the new company. An instance of testimony of this kind is furnished by the letter of June 21, 1897, written by Levy Mayer to William Hamlin, and Hamlin's reply thereto, dated June 22, 1897; that letter and reply are as follows:

"First, you will underwrite \$500,000.00, taking \$500,-000.00 preferred stock and about 143 per cent additional common, and will make a contract with a responsible party by which, in effect, you are to have the right to 'put' the amount so underwritten within a year and the other parties to have the right to 'call' that amount within the same time, the purchase price to be the amount to pay for the underwriting and six per cent additional.

This arrangement to be embodied in a contract, which shall be legally enforceable. Second, you will underwrite an additional \$500,000.00 upon a basis say of 50 per cent, you to get the \$500,000.00 preferred stock and about 143 per cent additional common stock, and to make a contract by which the second party is to have the right, within one year, to purchase of you this \$500,000.00 so underwritten, and to receive from you the \$500,000.00 preferred stock and 143 per cent common stock and to pay the price you paid therefor,—that is to say, 50 per cent, or \$250,000.00, and six per cent interest thereon; you to have no right to 'put' but the other party to have the right to 'call.' All this to be embodied in a contract legally enforceable." The letter then adds, viz.: "Should what I state here be in any way different from your understanding of the facts, I shall be glad if you will send me a line putting me right."

"BUFFALO, N. Y., June 22, 1897.

"*Mr. Levy Mayer, 811-839 Unity Building, Chicago, Ill.:*

"DEAR SIR—Your favor of the 21st inst. is this morning received. Your understanding of my proposition to underwrite, as therein expressed, is correct in every particular. You will remember that you said on Saturday that a 'put and call' arrangement, such as I have suggested, would not be legal in Illinois, and that you did not know whether it would be in New York State or not. At this writing I have had no legal advice upon the subject. Yours very truly, WILLIAM HAMLIN."

The letters above quoted show that, after June 9, when the last option contract of the American Glucose Company with the bank was executed by that company, Hamlin proposed to underwrite more than \$1,000,000.00 of stock in the new corporation to be formed; he says that the proposition to take this stock was made on behalf of the company, and would inure to the benefit of the stockholders. But whether the plant of the American Glucose Company was paid for in cash, or in stock of the Glucose Sugar Refining Company, makes no practical difference. The purchase of the plant of the American

Glucose Company was a part of the single transaction, which involved the purchase, at one and the same time, of the plants of all the six corporations. This was well known to William Hamlin, president of the American Glucose Company. He knew, and was informed by letters from the promoters of the transaction, that they were trying to purchase or secure the property of the other five companies. He also knew that the purchase of the other properties and the organization of the new corporation would not be effected or accomplished, unless there was at the same time a transfer of the property of the American Glucose Company. The parties organizing the combination refused to consummate it, unless Hamlin would bring into the combination the property of the American Glucose Company. Money and subscriptions were secured upon the faith of the option contract executed by Hamlin for the American Glucose Company, and deposited with the Illinois Trust and Savings Bank, on account of the belief by the parties, paying such money and subscriptions, that the American Glucose Company was to be a party to the combination.

That all the corporations acted together in the matter is shown clearly by the correspondence, including the letters of the attorneys, and by the facts that the option contracts of all the companies were delivered at the same time to the same repository, to-wit, the bank, to be transferred by the bank as the promoters of the scheme should direct, and by the further fact that all the deeds, conveying the several properties to the new corporation, were executed about the same time, and delivered simultaneously.

On June 11, 1897, John P. Wilson, Levy Mayer, and J. B. Greenhut, over their own signatures, addressed and delivered to the Illinois Trust and Savings Bank of Chicago a written communication, by the terms of which they deposited with the bank the six option contracts, executed by the six corporations respectively, and by

the terms of which it was agreed to sell their respective properties to the bank; and, in said written communication, after describing the contracts, the following statements were made, to-wit: "All of the said contracts are deposited with you on the following conditions: First, you shall hold, transfer, assign, or otherwise dispose of all of the said contracts in such way, and in such way only, as you shall be directed to do by the joint order in writing of the undersigned; second, unless you shall receive the joint order to the contrary thereof before August 16, 1897, you are authorized upon the request of said parties to said contract to surrender and deliver to said respective first parties their respective contracts." Below the signatures of Wilson, Mayer, and Greenhut, the Illinois Trust and Savings Bank, by William Henkel, its secretary, wrote the following, to-wit: "The undersigned hereby acknowledges the receipt of all the contracts mentioned in the foregoing instrument, and hereby agrees to hold said contracts subject to the conditions and provisions specified in said foregoing instrument."

The option contracts, thus deposited with the Illinois Trust and Savings Bank, remained with that bank until about August 5, 1897, or a few days thereafter. Let us see what was done in the meantime. On July 15, 1897, Levy Mayer telegraphed to William Hamlin, president of the American Glucose Company, to send abstract of title, and in his telegram added the following words: "Deal closed. Keep strictly confidential." About the same time Mayer wrote to Hamlin, acknowledging the receipt of a letter and telegram from him in regard to notice of a stockholders' meeting thereafter to be held, in which letter Mayer says: "The Davenport company, I am satisfied, for legal reasons could not be legally shut down, owing to the fact that its plant is in possession of its lessee, the Davenport Syrup Refining Company, which latter has a number of substantial contracts yet to be filled. I succeeded, however, in making very satisfac-

tory arrangement, by which it will be optional to the new company to take over outstanding contracts and to purchase undelivered produce on hand. May I trouble you to send me, as soon as possible, accurate memoranda of the improvements, and contracts for improvements, etc., which under your contract you will ask the new company to assume."

On July 17, 1897, Mayer sent to William Hamlin, president of the American Glucose Company, at Buffalo, New York, the following telegram: "Letter received. Matter has reached a point where its consummation is a certainty. It has been financed successfully and most satisfactorily, as you will agree when you learn details. If your counsel thinks stockholders' meeting necessary, please have same called to-day. A day or two is of the greatest service to me at this time. In your notice of meeting please state no more than is legally requisite. Am procuring the consent of different companies to shut down. Chicago, Peoria, Rockford, have agreed to do so at once. Firmenich has agreed to do so not later than next Saturday. Am now negotiating with Davenport in that direction. Would like you to do as we have done." To this telegram from Mayer, Hamlin sent the following telegram in reply: "We will do everything to facilitate you. Works stopped grinding Thursday on account of coal strike."

Can there be any doubt, after reading these letters and telegrams, that these parties were engaged in a scheme to have all the six corporations shut down their manufacturing, and abandon their business? Can there be any doubt that Hamlin, president of the American Glucose Company, knew that the other corporations were shutting down their plants with a view to conveying them to a new corporation, and that, in transferring the plant of his own company, he was aiding the consolidation of all the properties in one giant trust? It must be remembered in this connection, that preparations were all the

time going on for the organization of the new corporation, and that this new corporation was organized on August 2 or 3, 1897, and took possession of and commenced operating all the plants of the six corporations, which had suspended business, on and after August 12, 1897. But this is not all. On July 19, 1897, the board of directors of the American Glucose Company made and passed a resolution, which is set out in full in the statement preceding this opinion, wherein it was resolved that it was advisable to relinquish the business of manufacturing glucose and grape sugar, and such other business as it was engaged in at Peoria; and wherein it was resolved that the nature of its business should be changed, and that its plant and property in Peoria should be sold, and that its manufacturing should be thereafter confined to the manufacture of starch in Buffalo; and that a meeting of stockholders should be called to take place in Buffalo on August 3, 1897; and to which resolution was attached a notice, signed by George W. Lamb, secretary, that the meeting would so be held at the office in Buffalo on August 3, 1897, for the purposes specified in the resolution. On July 23, 1897, John P. Wilson wrote the following letter to William Hamlin: "In the matter of the proposed sale of the plant of the American Glucose Company at Peoria, under the contract heretofore executed between said company and the Illinois Trust and Savings Bank, I beg leave to say that all the arrangements have been perfected by the proposed purchasers to complete the purchase and pay for the plant within the time limited by said contract. The uncertainty as to the date of closing the purchase lies in the fact that a number of properties are under contract, the purchase of all of which had to be completed simultaneously. We have not yet received the abstracts of title to some of these plants. These abstracts of title will have to be examined and the titles to all of the plants proposed to be purchased approved before the transaction can be closed, as it is a

single transaction." If this letter, written by the attorney who was most active in promoting and carrying out the scheme for the consolidation of these properties, does not show that the several purchases of all the plants were to be made simultaneously, and together constituted a single transaction, then we fail to understand the meaning of the English language.

On July 26, 1897, Mayer wrote to Hamlin as follows: "I thank you for your very kind letter of the 24th inst. I hope to be able to arrange matters so that the recent destruction by fire to one of the buildings of the Peoria Grape Sugar Company will not interfere with the pending arrangements for the purchase of its property by the new glucose company. My address in New York will be Savoy Hotel, or American Spirits Manufacturing Company, Mills Building." On the same day Mayer wrote to Hamlin in reference to the salaries to be paid by the new company to Henry E. Grant, treasurer, and George W. Lamb, secretary of the American Glucose Company, as follows: "Under existing contracts the time has arrived to determine, as I am advised, what arrangements can be made with your Messrs. Grant and Lamb. As I am told, neither Mr. Grant nor Lamb seems to be satisfied with the amounts offered, Mr. Grant suggesting that he should receive \$25,000.00 a year and Mr. Lamb \$10,000.00 a year. It is, however, important that the new company should, if possible, secure the services of those gentlemen mentioned at salaries not exceeding those fixed by Mr. Matthieson. It is therefore now opportune for you to undertake the office of negotiating, if possible, with Messrs. Grant and Lamb, so that contracts as contemplated can be secured from them."

On July 27, 1897, Mayer wrote to Franklin B. Locke, of Buffalo, an attorney and a director for many years of the American Glucose Company, the following letter: "You ask for the name of the grantee. That has not yet been positively determined, though it is very probable



that the name will be 'United States Glucose Company.' This matter will be determined, in all probability, some time this week, when it is expected to apply for the charter. The new company will be organized under the laws of New Jersey. It is our intention to have printed contracts uniform, as near as possible, for execution by the different officers of the vendor companies." On the same day, Locke wrote to Mayer as follows: "I now hand you draft of the little agreement promised yesterday. If satisfactory, kindly O. K. it and return it to me, so that I can have it executed upon being advised of the formation of the new corporation."

The letters thus quoted not only show that the contracts of sale to be executed by the various corporations, selling their properties, were to be uniform in their terms, but also show that the new company was to silence opposition, as well as competition, by providing places for the officers of the old companies, and by taking from them contracts not thereafter to engage in the manufacture of glucose. The above letter from Locke to Mayer refers to an agreement, under which the Hamlins stipulated not to engage in the business of manufacturing glucose for a certain number of years. This transaction is thus brought within the scathing condemnation of the Supreme Court of the United States in *United States v. Trans-Missouri Freight Ass.* 166 U. S. 290, where it was held not to be "for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital;" and where it was held to be unfortunate for the country to deprive it "of the services of a large number of small but independent dealers;" and where it was held to be "not for the real prosperity of any country that such changes should occur, which result in transferring an independent business man, the head of his establishment small though it might be, into a mere servant or agent of a corporation for selling the commodities

which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others."

About this time, or shortly before this time, Mayer wrote a letter to Hamlin as to the insurance policies upon the property, asking for information in regard to the same, "so that, when the transfers are made to the new company, no time may be lost." He also wrote the following letter: "I want to say that I find on my return this afternoon that the matter is progressing to my entire satisfaction, and I have no doubt whatever that all the transactions can be completed unless some hitch should occur by reason of some defect in the titles, the abstracts of which are now being either brought down to date or examined. Some three have already been completed and delivered to us, and the others are being hastened forward to be completed. We are still waiting for your abstract."

On July 28, 1897, Hamlin wrote to Mayer as follows: "Mr. Grant's connection with us has given him perfect satisfaction in the past, is satisfactory to him now, and his contract insures him a comfortable living for five years to come. We are satisfied with the contract and intend to carry it out to the letter, unless, at his request, it be terminated before its natural expiration. We feel that some line of business not in competition with the new glucose company will soon be thought of by us in which Mr. Grant's knowledge and abilities will not only enable us to secure satisfactory returns, but will provide him with agreeable occupation and assure him fair pecuniary returns. The price for his services that he named to Mr. Matthieson, while very much in excess of the contract price with us, is not so unreasonable as it might seem at the first blush. In my judgment Mr. Grant is more responsible than any other individual for the condition of affairs that rendered it possible for all parties to give favorable consideration to the consolidation plan. I will

do that which I can fairly to promote his interests and those of the new company."

On July 29, 1897, John P. Wilson wrote to Locke as follows: "Will you kindly leave the name of the grantee in the contract blank for the present, and I will wire you the name of the grantee in ample time to be inserted before execution." In one of his letters written at this time, William Hamlin says: "Under Mr. Grant's management the capacity of the work was increased over fifty per cent, to 22,000 or 23,000 bushels. The increase of capacity, attended by a process that lessened the cost, enabled the American Glucose Company to produce its products and to sell them at a price that made the business, as a whole, unprofitable, in my opinion, to its competitors. We had lessened the cost of the labor and the cost of fuel, and increased the quantity and bettered the quality of the main and by-products."

On August 2, 1897, Wilson wrote to Locke as follows: "Might it not be well to keep the meeting of board of directors and stockholders alive by adjournment, so that, if any question should arise requiring action, the same might be speedily taken?"

On August 3, 1897, Mayer wrote William Hamlin as follows: "I find that during my absence all the moneys necessary to complete the purchase of the properties by the new company have been paid to the Illinois Trust and Savings Bank, and are now awaiting distribution. While east, the charter of new company was prepared, and was yesterday filed for record at Trenton, so that the new company, the Glucose Sugar Refining Company, is now in actual existence. The abstracts of title to the six properties have been furnished and have been examined. As you can well imagine, in a deal of this magnitude there are a large number of details to be looked after, as well as instruments of transfer and other contracts to be executed and delivered. These contracts must necessarily all be delivered contemporaneously. We shall be

able to begin to close the transaction this coming Thursday morning at ten o'clock, and hope to be able to conclude the entire work during that day, if possible. It is therefore necessary that all of the parties in interest should be in this city at the hour indicated." In reply to this letter, Mayer received the following telegram from Hamlin on August 4, 1897: "I will call on you at your office to-morrow morning."

On August 3, 1897, the meeting of the stockholders of the American Glucose Company was called pursuant to the notice already mentioned. At that meeting, George F. Harding, one of the plaintiffs in error and the stockholder who filed this bill, and who had theretofore written several letters to officers of the American Glucose Company, but had failed to obtain any definite or reliable information as to the proposed sale of the company's plant, made a motion that the stockholders of the company should refuse to ratify the alleged contract for the sale of the Peoria plant of the company to the glucose trust, or corporation, or its representative, upon the grounds that the sale was unlawful, as being prohibited by the statute against trusts of the State of Illinois; and that the creation of a trust in glucose by contract with the company for the purchase and sale of a necessary element in the unlawful combination by such sale was in violation of the powers of the company as given by its charter; and that the contract to relinquish the right to manufacture glucose was against both the right, interests, and powers of the company; and that the price named and made in the offer was grossly inadequate, and that it was not within the powers or duties of the president of the company to make the sale.

At this stage of the proceedings and upon this date, to-wit, August 3, 1897, the original bill in this case was filed, and an injunction was obtained. The new company, the Glucose Sugar Refining Company, had only come into existence on the day before the bill was filed. All the

proceedings, which are now to be detailed, occurred after the filing of the bill in this case, and inasmuch as the American Glucose Company was served with summons August 3, 1897, the transfers and other transactions hereinafter mentioned were made and took place *pendente lite*.

By an instrument in writing, dated August 5, 1897, signed by John P. Wilson, Levy Mayer, and J. B. Greenhut, and concurred in in writing on August 7, 1897, by Edwin L. Johnson, hereinafter named, and addressed to the Illinois Trust and Savings Bank of Chicago, the bank was designated as the party of the second part in the option contracts, heretofore referred to and made by the six corporations already named; and said communication to the bank recited, that all of said contracts had been deposited by Wilson, Mayer, and Greenhut with the bank to be held, transferred, and disposed of by it subject to their joint order; and that, in and by all said contracts, it was understood and agreed that the same might be transferred and assigned by the bank; and that, when so transferred and assigned, the said contracts respectively, and all of their respective parts or provisions, should inure to the bank, and should run in favor of, and be obligatory upon, its transferee, and be of the same purport and effect, as though such transferee had originally been made second party to the said contracts respectively; and it was further therein recited, that it was in all said contracts further provided that, in case of said transfer and assignment by the bank, all of its rights, as well as said obligations under said contracts respectively, whatever the same might be, should forthwith cease and terminate; and after such recitals the said Wilson, Mayer, and Greenhut therein requested that, pursuant to the terms of all said contracts respectively, the bank should forthwith, by proper instruction, transfer and assign all said contracts respectively to Edwin L. Johnson, of Chicago, and all of said contracts, when so transferred and assigned by it to Johnson, should inure to his benefit,

and run in favor of, and be obligatory upon him to the same purport and effect, as though he had originally been made the second party to said contracts respectively.

The Illinois Trust and Savings Bank of Chicago was a corporation, organized under the laws of Illinois for the purpose of doing a banking business, and had no power under its charter to purchase the plants and properties of corporations, engaged in the manufacture of glucose and grape sugar. Therefore, the option contracts, providing for a sale of these properties to the bank, were absolutely void. It does not appear, that the contracts were signed by the bank, but, when signed by or for the respective corporations, they were accepted and held by the bank. The bank claims that these contracts were delivered to it to hold in escrow, and that it merely acted for the parties as the repository or custodian of these contracts, subject to be disposed of as the parties might order. The proof tends to sustain the contention of the bank that it was a mere repository of the papers. It went further, however, in its assistance of these parties to carry out their scheme, than merely to act as custodian of the papers.

Attached to each contract of sale was a written assignment thereof by the bank to Edwin L. Johnson, who therein accepts the assignment, and assumes all the obligations created by the contract in favor of the bank. These written assignments, signed by the bank and Johnson, appear to have been dated August 9, 1897, except the assignment on the contract of the American Glucose Company, which was dated August 11, 1897. At least two of the contracts thus signed provided, that the proposed corporation should be organized in such State, and in such manner as should be satisfactory to John P. Wilson and Levy Mayer.

A deed, dated August 7, 1897, was executed by the American Glucose Company, by William Hamlin, its president, conveying the plant of the company in Peoria

to Edwin L. Johnson, of Chicago, for an expressed consideration of \$1,750,000.00, which deed was recorded on August 12, 1897. A deed, dated August 9, 1897, was executed by Edwin L. Johnson, conveying the said plant in Peoria to the Glucose Sugar Refining Company of New Jersey for an expressed consideration of \$10.00, and other good and valuable considerations, which deed was also recorded on August 12, 1897. A deed, dated August 7, 1897, was executed by the Chicago Sugar Refining Company, conveying to said Johnson its plant in Chicago and the real estate on which it was situated, for an expressed consideration of \$6,250,000.00; which deed was recorded also on August 12, 1897. A deed, dated August 9, 1897, was executed by said Johnson, a bachelor of Chicago, to the Glucose Sugar Refining Company of New Jersey, conveying the same property in consideration of \$10.00 and other good and valuable considerations. Other deeds were executed by the other corporations to Johnson, and by Johnson to the Glucose Sugar Refining Company. The witnesses testify, that these deeds were delivered to the Glucose Sugar Refining Company, or to C. H. Matthieson, its president, simultaneously. The deeds were delivered at the banking office of the Illinois Trust and Savings Bank on the evening of August 11, 1897, at 5:30 o'clock, which was after the regular business hours.

The injunction writ was served upon the American Glucose Company on August 8, 1897; and the injunction was in force until August 11, 1897, when it was dissolved. It will thus be observed, that the request of Wilson, Mayer, and Greenhut to the bank to assign the contracts, and the execution of the deeds by the corporations to Johnson, and by Johnson to the Glucose Sugar Refining Company, were all made and effected while the injunction was pending. The option contracts referred to, and the assignments attached thereto, were also delivered by the bank to Johnson on the evening of August 11, 1897, but these and all other papers were at once handed back

by Johnson to the bank, and placed in its vaults. Edwin L. Johnson above referred to was a clerk in the law office of John P. Wilson. He never paid a dollar for the purchase of the vast properties, which were conveyed to him, nor did he receive a dollar when he conveyed these properties to the Glucose Sugar Refining Company. When he signed the deeds, he did not know what he was doing; nor did he know that any deeds were executed to him by these various corporations; nor were any such deeds delivered to him. The testimony of Johnson is in the record, and he says: "I am a clerk in Mr. Wilson's office; \* \* \* never had any connection in any way with the defendants; \* \* \* never received a deed from any of them that I know of, nor from the American Glucose Company, nor authorized any one to receive one for me; some papers I executed; I don't know whether they were deeds or not; I did not read the papers there; \* \* \* I was acting under instructions of Mr. Wilson; he did not tell me what they were; to my knowledge I never received any deeds." At the taking of the testimony in this case, Wilson made the following statement which was taken down by the commissioner, and is in the record: "As to Mr. Johnson's testimony, Mr. Johnson was a clerk in my office, and I stated to him in connection with the transfer of the titles of the glucose property, that I should like to have the titles taken in his name, and have him make the conveyance to the new company; he consented, and he signed such papers as I presented to him on my statement that they were all right. His relation was merely acting at my request as the person through whom the title should be conveyed, and having no part in the negotiations whatever. He was present when the deeds were received and delivered, and received the documents. I am not sure whether the deeds passed into his hands, but I think they did, and this was done in his name with his consent. Mr. Johnson would not be able to state the contents of the documents, not having read them."



Henkel says, that all the papers in regard to this transaction, that came into the hands of the bank, were vouched for by Wilson and Mayer; and that, among the papers so handed to the bank and vouched for by Wilson and Mayer, was a written order, signed by Edwin L. Johnson, and endorsed as correct by Wilson and Mayer, dated Chicago, August 10, 1897, and which is in the following words: "I hand you herewith certificates for 34,500 shares of preferred stock, and 49,285 $\frac{1}{4}$  shares of common stock, of the Glucose Sugar Refining Company of New Jersey, with which to satisfy and cancel the receipts for money received by you under the underwriters' agreement in regard to said company, and request you to turn over and pay out all money so deposited under the underwriters' agreement as follows, namely: To the American Glucose Company of New Jersey \$1,977,000.00; to the American Preservers' Company of West Virginia \$700,000.00; to the Glucose Sugar Refining Company of New Jersey \$773,000.00; the above amounts include two subscriptions, aggregating \$75,000.00, upon which you have as yet issued no certificates." What the underwriters' agreement referred to in this order was the record does not show, as Wilson refused to allow the witnesses to testify in regard to it, and refused to allow it to be produced in evidence. That underwriters' agreement was the authority, under which the bank received the money, and gave the receipts mentioned in the order. The details in the matter were conducted and arranged with the bank by Wilson and Mayer, but, owing to the refusal of the witness to testify at the suggestion of counsel, it is impossible to state what those details were.

On the evening of August 11, 1897, the officials and representatives of the six corporations, entering into the consolidation scheme, were present at the Illinois Trust and Savings Bank; and there, upon that occasion, a delivery took place to the parties of the deeds and other documents. A check was there handed to H. E. Grant,

treasurer of the American Glucose Company, for \$377,000.00, but not for \$1,977,000.00. The amount named in the order of August 10, to-wit, \$1,977,000.00, exceeded the consideration, to-wit, \$1,750,000.00, named in the deed of the American Glucose Company to Johnson, by \$227,000.00. Why the amount named in the deed was thus increased, or what became of the excess, does not appear.

It appears in the testimony of H. E. Grant and C. H. Matthieson, that in the bank on the evening of August 11, 1897, there were present Matthieson and Wilson, representing the Chicago Sugar Refining Company; Ream, representing the Rockford company; Best and Krause, representing the American Preservers' Company; Edward Mayer, representing the Peoria Grape Sugar Company; George Firmenich, representing the Firmenich Manufacturing Company; and Grant, representing the American Glucose Company. Grant says: "The deeds were all delivered there at about the same time. I was paid first, delivered my papers, and took my check. I was called by Mr. Henkel, secretary of the bank. He stood in the middle of the room, and called the American Glucose Company. I delivered the papers, took my check, and went out; don't know who was called next."

An agreement, dated August 11, 1897, the same day on which the delivery of the deeds took place as above stated, was executed between the American Glucose Company, as party of the first part, and the Glucose Sugar Refining Company as party of the second part, which agreement is as follows:

"Whereas, the parties hereto are engaged in the business of manufacturing and selling glucose, grape sugar, starch and kindred products, and the various products of a glucose factory; and whereas, contemporaneously herewith, the second party has purchased all the real estate, leasehold, buildings, improvements, appurtenances, easements, plant, machinery, fixtures and utensils belonging to the first party, and situate in the city of Peoria,

etc.; and whereas, a valuable and substantial part of the consideration paid by the second party for the property so as aforesaid described was and is the agreement herein contained:

"Now, therefore, in consideration of the premises and of the sum of one dollar (\$1.00) and other good and valuable considerations, the first party hereby covenants and agrees with the second party, its successors or assigns, that the first party shall not and will not, at any time during the period of twenty-five years from and after the date hereof, within a radius of fifteen hundred miles of the city of Chicago, Illinois, engage in the business of buying, manufacturing or selling glucose, grape sugar or any of the products now produced by any glucose factory, and the first party shall not, and will not at any time during said period of twenty-five years from and after the date hereof, use in its starch factory at Buffalo the process commonly known as the 'acid' process, which process is now in general use in glucose factories in this country."

On August 7, 1897, or about that date, the American Glucose Company assigned to Johnson its patents and policies of insurance, and its business and factories at Peoria, and all of its good will and its business, etc. On August 28, 1897, at a meeting of a majority of the stockholders of the American Glucose Company at Camden, New Jersey, that company reduced its authorized capital stock from \$1,500,000.00 to \$150,000.00, and its stock actually issued from \$1,322,500.00 to \$132,250.00, and ratified the action, taken at the other meeting on August 3, 1897, and ratified the action of the president and directors in selling the plant at Peoria to Edwin L. Johnson, of Chicago. The action, taken at Buffalo, New York, on August 3, 1897, was taken in New York by the stockholders of a New Jersey corporation. It has been recognized as a general rule by this court, that the power of a corporation to perform corporate acts outside of the State of its crea-

tion, and where the laws of its corporate existence have no force, does not exist. (*Bastian v. Modern Woodmen*, 166 Ill. 595). As to the attempted ratification of the alleged sale to Edwin L. Johnson, it has already been shown that there was no sale to Johnson.

*Second*—A question of law, which arises in the case, is whether the facts, set up in the bill, constitute an illegal trust. The pleadings in the case are in a somewhat singular condition. Some of the defendants answered the bill. One of the defendants to the amended bill filed a paper, which was in part an answer, and in part a demurrer. Others of the defendants demurred to the whole bill. All the demurrers, both in whole and in part, were sustained by the trial court. We are of the opinion that they should have been overruled.

A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor from the trustees. But the question in the present case is, whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation, organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy, and is void. (2 Cook on Corporations,—4th ed.—sec. 503a). It makes no difference, whether the combination is effected through the instrumentality of trustees and trust certificates, or whether it is effected by creating a new corporation and conveying to it all the property of the competing corporations. The test is, whether the necessary consequence of the combination is the controlling of prices, or limiting of production, or suppressing of competition, in such a way as thereby to create a monopoly. The demurrers confess the truth of the allegations in the bill; and those allegations are, that a trust was created,

or proposed to be created, by the organization of a new corporation and the conveyance thereto of all the property owned by the six competing corporations, and the execution of agreements by the corporations, thus parting with their property, not any longer to engage in the manufacture of the industrial products in which they had been previously engaged. Six corporations were engaged in the manufacture of glucose, which can only be manufactured in a certain district or extent of country, and, with the exception of one small plant, were the only corporations engaged in such business. The allegations of the bill show, that the ability to prosecute such business was rare, and that it is difficult for new parties, not familiar with it, to engage in it. Necessarily, when corporations thus situated unite together all their properties in one new organization, and permit the latter to operate their properties, competition will be suppressed, and the new corporation will possess the power to limit production and control prices. All the competing corporations have been put out of the business by disposing of the plants, with which they conducted their business. The grantee of said corporations has no competitor in the market.

The public policy of a State is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and in the constant practice of government officials. When the legislature speaks upon a subject, upon which it has the constitutional power to legislate, public policy is what the statute, passed by it, indicates. (*United States v. Freight Ass.* 166 U. S. 290). The public policy of the State of Illinois has always been against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly.

In *Craft v. McConoughy*, 79 Ill. 346, we held it to be a well settled rule of law, that an agreement in general restraint of trade is contrary to public policy, and is illegal and void.

In *People ex rel. v. Chicago Gas Trust Co.* 130 Ill. 268, we forfeited the charter of a company, on the ground that it was formed to bring about an illegal combination; and held that an agreement, tending to prevent competition and create a monopoly, is void by the principles of the common law, because it is against public policy; and that public policy favors competition in trade, and is opposed to monopoly, as tending to advance market prices to the injury of the general public.

In *More v. Bennett*, 140 Ill. 69, we held again, that contracts, restraining the freedom of trade, diminishing competition, or regulating the prices of commodities, are prohibited by law; and that all combinations of capitalists and of workmen in their especial favor, by raising or reducing the prices, are so far illegal, and that agreements to combine for such purposes will not be enforced by the courts.

Again, in *Bishop v. American Preservers' Co.* 157 Ill. 284, we held that an agreement providing for the welding together of all the interests, engaged in a certain business, in one giant combination under the absolute dominion and control of a board of trustees, was void as contrary to public policy.

It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties. In the present case each of six corporations, engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized, and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business; and it did all this with the knowledge and understanding, that each of five other competing corporations was making the same kind of contract, and executing the same

kind of conveyance in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they at least constituted a scheme understood by all the corporations, and participated in by them all. The carrying out of the scheme, thus understood and participated in, would necessarily result in the suppression of competition in the manufacture of glucose, and in the creation of a monopoly in that business. A part of the scheme was, that none of the six corporations or their officers should, for years, engage in the manufacture of glucose, and this feature of the scheme necessarily contemplated a wiping out of all competition in the business.

In *Distilling, etc. Co. v. People*, 156 Ill. 448, we held that a combination to control the manufacture and sale of all distillery products, so as to stifle competition and regulate and dictate prices, was an illegal attempt to create a monopoly, and that an organization, which has a tendency to create a trust and constitute a monopoly, is contrary to public policy and unlawful. In the latter case, it was claimed that the illegal character of the combination was removed by a change of organization, so as to have the properties of the combining distillery companies transferred directly to the new corporation organized for that purpose; but it was held that this change was formal rather than substantial, and that the same interests were controlled by the same agencies, as had controlled them under the former organization. So it is in the case at bar; the men, who control the new corporation, which was organized, to-wit, the Glucose Sugar Refining Company, are the same men, for the most part, who were interested in, and controlled some one or more of the six corporations, which disposed of their plants. Many of

the stockholders in the old corporations are holders of stock in the new corporation.

In *Distilling, etc. Co. v. People, supra*, this court spoke with approval of the case of *Richardson v. Buhl*, 77 Mich. 632; and, in the Michigan case, it appeared that the corporation, known as the Diamond Match Company, was organized to manufacture, buy, sell, and deal in friction matches, etc., and that the real object of the corporation was to buy up the property of all the corporations, or of individuals, engaged in the manufacture of friction matches, exacting from the seller in the several cases a bond that he would not for a term of years engage in, or aid any one else in, the manufacture of matches in any place where his action might conflict with the interests, or diminish the profits of the Diamond Match Company; and in that case the purposes of the company were declared to be unlawful, and it was held that any contract made to further them was void as against public policy. In *Distilling, etc. Co. v. People, supra*, we used, in reference to this Michigan case, the following language (p. 489): "It was held that a corporation, organized for the purpose of controlling the manufacture and sale of friction matches, and by means of which all competition was stifled, and opposition crushed, and the whole business of the country in that line engrossed by the corporation, was a menace to the public, its object and direct tendency being to prevent fair competition and to control prices; that it is no answer to say that the monopoly had in fact reduced the prices of friction matches; that such policy may have been necessary to crush competition; that the fact exists that it rests in the discretion of the corporation to raise prices at any time to an exorbitant degree; and that such combinations have frequently been condemned by courts as unlawful and against public policy."

The material consideration in the case of such combinations is, as a general thing, not that prices are raised,



but that it rests in the power and discretion of the trust or corporation, taking all the plants of the several corporations, to raise prices at any time, if it sees fit to do so.

It does not relieve the trust of its objectionable features, that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors.

In the case at bar, however, the proof shows that, upon the completion of the new organization, and as soon as it began to operate the several plants conveyed to it, the price of glucose and its various products began to go up. One of the witnesses testifies that, in May, 1897, the price of glucose was about seventy-five cents (75 cts.) per one hundred pounds, and that, after that, it began to go up, and went as high as \$1.65 per one hundred pounds.

The public policy of this State in regard to this matter is not only manifested by the decisions of the Supreme Court of the State as already referred to, but by the legislation of this State. By an act approved June 11, 1891, the legislature of Illinois enacted, that "if any corporation organized under the laws of this or any other State \* \* \* for transacting or conducting any kind of business in this State, or any \* \* \* individual or other association of persons whosoever, shall create, enter into, become \* \* \* a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, \* \* \* individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation \* \* \* or individual or other association of persons shall be deemed and

adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act." Section 2 of the act provides, that "it shall not be lawful for any corporation, \* \* \* agent, officer or employes, or the directors or stockholders of any corporation to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee, or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article." Section 3 provides that, if a corporation or a company, firm or association shall be found guilty of a violation of the act, it shall be punished by a fine running from \$500.00 to \$15,000.00, according to the number of times the offense is committed. Section 4 of the act provides, that any president, manager, director, or other officer or agent or receiver of any corporation or association or any member of any company or association, or any individual, found guilty of a violation of the first section of the act, may be punished by a fine of not less than \$200.00, nor to exceed \$1000.00, or be punished by confinement in the county jail, not to exceed one year, or both, in the discretion of the court, etc. Section 5 of the act provides, that any contract or agreement in violation of any provision of the first four sections of the act shall be absolutely void.

This act of June 11, 1891, came under the consideration of this court in *Ford v. Chicago Milk Shippers' Ass.* 155 Ill. 166, and was there held to be constitutional. (Sess. Laws of Ill. p. 206).

The demurrers admit the allegations of the bill to be true. The American Glucose Company, a corporation or-

ganized under the laws of the State of New Jersey, for transacting business in Illinois, and the other persons whose names appear in the record, created and entered into a trust or combination with themselves, and with one or more of the five corporations other than the American Glucose Company, who conveyed their plants to the Glucose Sugar Refining Company, and with the Glucose Sugar Refining Company, to regulate and fix the price of glucose and grape sugar and their products and by-products; and they also entered into such combination to fix or limit the amount or quantity of glucose to be manufactured, produced, or sold in this State. These parties, therefore, under the act were guilty of a conspiracy to defraud. The testimony tends to sustain the allegations of the bill. James A. Lamon says: "The price of glucose has been within thirty or sixty days past \$1.00 (per hundred pounds). \* \* \* The price is made, as I understand it, by Pope and by the combination. As I understand it at the present time, the glucose is \$1.35, I believe, and twenty-five or a quarter of a cent a hundred rebate made at the expiration of six months to the purchaser. That is by this trust or combination." L. G. Yoe testifies: "Our last purchase was made of the Glucose Sugar Refining Company on the first of this month (October or November). The price was \$1.25. We were to have a rebate at the end of six months on condition of dealing exclusively with them." The evidence shows, that efforts were made to induce Pope to go into the combination and transfer his plant or manufactory to the Glucose Sugar Refining Company. When Pope was on the stand as a witness in this case, and declined, under instructions from Wilson, to state whether or not he was manufacturing glucose at all at that time, or whether he had ever sold glucose, or whether he had manufactured much glucose during the preceding two years, he stated that he had had negotiations with Wilson, and with parties claiming to represent a combina-

tion or union of factories, but declined to state what price Wilson offered him for his factory.

By the act approved June 20, 1893, in regard to trusts and combines, the legislature of Illinois enacted, "That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First, to create or carry out restrictions in trade. Second, to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third, to prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth, to fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up, and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth, to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or

others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interests they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected." Section 2 of the act of 1893 provides, that any corporation, holding a charter under the laws of this State, which shall violate any provision of the act, shall forfeit its charter and franchise. Section 4 provides that any foreign corporation, violating any provision of the act, is thereby denied the right and prohibited from doing any business in this State. Section 5 provides, that "any violation of either or all of the provisions of section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person, who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall as principal, manager, director, agent, servant, or employee, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder or in pursuance thereof shall be punished by fine not less than \$2000.00 nor more than \$5000.00." Section 6 provides that, in any indictment for any offense under the act, it shall be sufficient to state the purposes and effects of combination, and that the accused was a member of, and acted in pursuance of it, without giving its name or description, etc. Section 7 provides that in prosecutions under the act it shall be sufficient to prove that a trust or combination as defined therein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it might have been based, or that it was evidenced by any written instrument at all. Section 8 provides that any contract or agreement in violation of the act shall be absolutely void and not enforceable either in law or in equity.

The bill in this case most certainly contains allegations in regard to the existence of a combination of capital and acts by two or more persons and corporations to prevent competition in the manufacture of glucose and grape sugar and their products and by-products, and to create and carry out restrictions in trade, which allegations bring the transactions referred to in the bill within the scope and meaning of section 1 of the act of 1893. Therefore, the demurrers were improperly sustained to the bill.

*Third*—Counsel for the Glucose Sugar Refining Company claim, however, that the demurrer was properly sustained to the bill, upon the ground that a stockholder has no right to file such a bill as this. The position of counsel is, that a stockholder can only file a bill to prevent the corporation from disposing of its properties, upon the ground that it will affect his pecuniary interests, and because of the necessity of protecting his property rights, and because of the necessity of protecting himself from pecuniary loss or injury; and that a stockholder in a vendor corporation has no right to enjoin a sale and transfer of a factory, owned by such vendor, upon the ground that the vendee corporation proposes to create a monopoly in the manufacture of glucose, and to use the property sold to that end, the vendor being charged to have knowledge thereof. It is said that a stockholder does not represent the public, and has no right to maintain a bill to protect the public interests, or to prevent a violation of the law against trusts and combines. This contention assumes that the creation of a trust and monopoly, as described in the bill, will work no injury to the stockholder filing the bill. In support of this contention counsel rely mainly upon the cases of *Cope v. District Fair Association of Flora*, 99 Ill. 459, and *Coquard v. National Linseed Oil Co.* 171 id. 480.

In *Cope v. Fair Association of Flora*, *supra*, the bill was filed by a stockholder in an incorporated fair association

to restrain the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company during its annual exhibitions; but it did not appear there from the bill or otherwise, that the complainant therein or the company had thereby sustained any pecuniary injury or loss. Here, the demurrer admits the allegations of the bill to be true, and the bill alleges that the proposed action of the American Glucose Company and its directors in disposing of its property will destroy the value of the complainants' stock therein, and will destroy the property and business of the glucose company, and irreparably injure the complainants; and that their stock will be reduced in value to less than one-twentieth of its cost. Moreover, the bill expressly refers to the acts of 1891 and 1893 above set forth; and the latter act provides for a forfeiture of the charter and franchise of any corporation violating the provisions of the act, and the dissolution of its corporate existence. It is idle to say that a stockholder in a corporation would suffer no injury from a forfeiture of its charter rights and from its dissolution. In such a case, the corporation being destroyed, his stock therein would be completely wiped out, and be made of no effect. The stockholder has a right to protest against such use of its property by the managing officers of a corporation, as will lead to such forfeiture and dissolution. But the matter complained of in the *Cope* case did not relate to any disposition of the corporate property, but related merely to a license, given by the association to outside parties permitting them to gamble. The case is not on all fours with the present case in any particular.

As to the case of *Coquard v. Linseed Oil Co. supra*, the main object of the bill there was to enjoin the officers of a corporation from interfering with the right of a stockholder to examine its books, etc. It would also appear that, in that case, the prayer of the bill was that the cor-

poration should be wound up, and its charter should be forfeited; and it was held that such forfeiture, for injury to the public and to its rights could only be enforced by the State. In the case at bar, the bill does not seek the forfeiture of the charter. Moreover, it was alleged there that the stockholder filing the bill had, for anything that had appeared to the contrary, participated in the illegal acts of which he complained, and for a number of years had full knowledge of the occurrences which he recited; and it was there said that his participation or *laches* of many years barred him from obtaining relief on his own account. In that case, the main ground, upon which the decision of the court was based was, that, in order to entitle himself to relief against the formation and operation of an illegal trust, the complaining stockholder must be free from participation in such illegality, and cannot take personal advantage thereof, when he has been guilty of acquiescence and long delay. The *Coquard case* is not applicable here. The bill here alleges, and the proof shows, that the dissenting stockholder, who filed the bill, vainly sought information from the officers of the American Glucose Company as to what they proposed to do in the matter of organizing a trust and disposing of its property thereto. The bill and proofs show, that the stockholder, filing this bill, attended the meeting of stockholders, held at Buffalo, August 3, 1897, for the purpose of taking action in reference to relinquishing the manufacturing of glucose and grape sugar, and selling the plant and property of the company; and that he there protested against such action on the part of the company, and presented a motion that the stockholders should refuse to ratify the offer and proposed contract for the sale of its Peoria plant. So far from acquiescing in the illegal action of the corporation, the plaintiff in error, Harding, did all that he could to defeat and prevent such action, and did this at once and without delay.



It must be remembered that, here, the pecuniary interest of the complaining stockholder was to be, and was, affected by the sale of the entire property of the American Glucose Company against his consent, and by the abandonment of its charter business against his consent, and by the utter inability of the corporation to make money or win profits, which necessarily resulted from such a sale, and from a contract not to further engage in the charter business, notwithstanding the American Glucose Company was a solvent and going concern, and doing and able to continue to do a profitable business. The shares of stock, owned by a stockholder, derive their value from the corporate property and franchise, although the stockholder's legal property in his stock is distinct from the property of the corporation. (*Porter v. Rockford, Rock Island and St. Louis Railroad Co.* 76 Ill. 561). If the shares derive their value from the corporate property and franchise, they will have no value practically, when all such corporate property is disposed of, and the right to carry on business is destroyed. What was here attempted was an abandonment of the business and a sale of the assets without a legal termination or dissolution of the company. It makes no difference that the stockholder is to be allowed to receive his proportionate share of the proceeds of the sale of the property. He has the right to hold his investment in the form of stock, and a change of such investment against his consent is a change which affects his pecuniary or financial interests. He has the right to be the judge, whether such a change in his pecuniary status shall be made, or whether he shall continue his investment in the form of stock.

The bill in this case recites, that the complainants therein filed it, not only in their own behalf, but in behalf of all other stockholders, who might see fit to come into the suit and join therein. Where the officers of a corporation wrongfully deal with its property to the injury of the stockholders, the latter may maintain a bill against

the company and its officers for relief against such misappropriation. Originally, the rule was that such a suit should be brought by the corporation itself; but equity permits a stockholder, either individually or on behalf of other stockholders similarly situated, to bring such a suit, where the corporation itself either refuses to do so, or where the facts show that the wrongdoing defendants constitute a majority of the managing body, or where it is reasonably certain that a demand made upon the proper officers of the corporation to bring the action would be unavailing. (*Green v. Hedenberg*, 159 Ill. 489; *Bruschke v. Nord Chicago Schuetzen Verein*, 145 id. 433). Here the bill alleges, and the proof shows, that the officers and directors of the American Glucose Company and the majority of its stockholders were in favor of disposing of its property to the new corporation to be formed, and that they adopted a resolution to carry out such action against the protest of Harding. Therefore, no previous demand upon the managing officers to bring this suit would have been availing. It follows, however, that, where the bill in such case is filed by the stockholder, the final relief, when obtained, belongs to the corporation and all its stockholders, and not alone to the stockholder complaining. In view of this fact, Pomeroy in his work on Equity Jurisprudence, (sec. 1095,) says: "This view completely answers the objection, which is sometimes raised in suits of this class, that the plaintiff has no interest in the subject matter of the controversy nor in the relief. In fact, the plaintiff has no such direct interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice." Morawetz, in his work on Private Corporations, (sec. 271,) says: "A corporation and its shareholders are identical. \* \* \* Obviously, then, any injury to a corporation must be an injury to its shareholders; and it follows, that, subject to the limitations that have

been pointed out, a shareholder is entitled to relief in equity on account of any wrong constituting an infringement of the corporate rights."

The views above expressed are abundantly sustained by authority. In *Stewart v. Erie and Western Transportation Co.* 17 Minn. 372, the Supreme Court of Minnesota said: "We agree with the plaintiff's counsel, and with the cases by him cited, that it is against the general policy of the law to destroy or interfere with free competition. \* \* \* An unauthorized monopoly, is, therefore, against public policy as destroying and interfering with free competition. \* \* \* If a corporation is employing its statutory powers, funds, etc., for purposes not within the scope of its institution, a court of equity will, upon the application of a single dissentient stockholder, interfere by injunction. \* \* \* The right of a stockholder to this interference seems to be placed upon the ground that, from the fact that the corporation was created for certain purposes, there is an implied contract that it shall not divert its powers or funds to other purposes, and that such diversion would be a species of breach of trust as well as a violation of law, which might endanger the existence of its charter. But it is to a dissentient stockholder that the relief is granted, and to a stockholder who comes with diligence to assert his rights. \* \* \* There is no good reason, of which we can conceive, why the plaintiff's right to maintain this action should stand upon any different footing because the contract provides for a monopoly, or because it is simply *ultra vires*. In either case, the contract is illegal: \* \* \* Defendant's objection, that the complaint does not state a cause of action, because no facts are alleged going to show that he will suffer any pecuniary damage in consequence of the contract complained of, is not well taken, not only because the complaint alleges that the effect of the contract, if carried out, will be to render plaintiff's stock worthless, but because if the contract is illegal, as

alleged, it may lead to a total forfeiture of the charter of the company in which plaintiff is a stockholder."

In *Small v. Minneapolis Electro-Matrix Co.* 45 Minn. 264, the court said: "We need not inquire how far, or under what circumstances, considerations of public policy and of the general interests of the State may affect the right of a corporation to discontinue the business, for which it was created, and to surrender to another corporation its property and the conduct of such business. We do decide, that such a surrender of the property, and, so far as possible, of the functions of a corporation, in order that, while it is to still continue in existence, its business may be carried on by another corporation, to which such transfer is made, would violate the rights of a non-assenting stockholder, arising from the contract implied, if not expressed, in the creation of such an organization; and he would be entitled to have such acts restrained by injunction." (See, also, *Abbott v. American Hard Rubber Co.* 33 Barb. 578; *People v. Ballard*, 134 N. Y. 269).

In the fourth edition of Cook on Corporations (secs. 669, 670), it is said: "That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly imbedded in the jurisprudence of modern times. \* \* \* Any act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the expressed or implied powers of the charter of incorporation, or of association—in other words, any *ultra vires* act—is a breach of the contract between the corporation and each one of its stockholders, and consequently any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract as set forth in the charter. \* \* \* Ever since the case of *Abbott v. American Hard Rubber Co.* 33 Barb. 578, the law has been clearly established in this country, that a dissenting stockholder may prevent the sale of all the corporate property by the directors, or by a majority of the

stockholders, where the corporation is a solvent, going concern. And even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made. If the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. \* \* \* Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly what cannot legally be done directly."

The allegations of the bill in this case, as well as the answer of the Glucose Sugar Refining Company, and the testimony taken in the case show, that the property of the American Glucose Company was passed over to a new corporation, to-wit, the Glucose Sugar Refining Company; and that the latter company was to continue the business, theretofore prosecuted by the American Glucose Company, which was a solvent concern and doing a profitable business. There is no reason why the American Glucose Company should not have continued to prosecute its own business, instead of turning it over to be prosecuted by a new corporation, unless the officers, directors, and stockholders, making the transfer to the new corporation, expected, by suppressing competition, to fix and control prices, and thereby increase their own profits to the injury of the consumers of the manufactured products and of the public generally. It must be remembered, that these transfers of properties were not made by the six corporations to a corporation already existing and doing business, but a new corporation was to be created, and was created, for the express purpose of taking and using the properties to be conveyed to it. All the arrangements for the several transfers were made before the new corporation was allowed to come into existence. The only purpose of its existence was to take and use, in

a consolidated form, all the plants of the six old corporations. The illegal trust or combination was formed, not after the making of the sales, but by the sales themselves.

The contention of counsel for the Glucose Sugar Refining Company, that the American Glucose Company had a right to make a sale of its plant to the new corporation, and that this transaction must be regarded by the court merely as a valid sale, is not supported by the allegations of the pleadings, or by the proofs herein. The transfer of its property, made by the American Glucose Company, was a transfer to a corporation, created for the express purpose of taking its property and the property of other corporations, so as to use them in the suppression of competition, and in the creation of a monopoly in the manufacture of glucose, and grape sugar, and their products and by-products. The whole scheme, as devised and consummated, was a fraud not only on the public, but upon the dissenting stockholder filing this bill. We are, therefore, of the opinion that the bill was not demurrable because brought by a stockholder, and that the court below erred in sustaining the demurrer, if it was sustained upon that ground alone.

*Fourth*—It is claimed by counsel that, inasmuch as the American Glucose Company is a corporation organized under the laws of the State of New Jersey, this bill will not lie. Counsel for defendants below introduced in evidence sections from 6 to 32 of an act of the legislature of New Jersey concerning corporations, passed in 1896, after the American Glucose Company was incorporated, which was in 1883. Section 27 of the act in question provides, that every corporation organized under that act may change the nature of its business, increase and decrease its capital stock, etc., in the manner provided for in that section. Section 28 of the act provides, that any corporation, whether organized under a special act of incorporation, or under general laws, with certain exceptions, may relinquish one or more branches of its busi-

ness. It is claimed, that, under said sections 27 and 28, the American Glucose Company was authorized, under the laws of the State which gave it its charter, to do the acts which have been heretofore referred to and set forth; and that, by reason of its being a foreign corporation, this State cannot entertain a bill, which seeks to inquire into the manner, in which its directors manage its affairs and exercise its charter powers. The bill alleges, and the proof shows, that the American Glucose Company owned a plant, consisting of real estate and buildings thereon together with the machinery, fixtures, etc., therein, situated in the city of Peoria in this State, and that it operated said plant in this State, and therewith conducted the business of manufacturing glucose and grape sugar. Being a foreign corporation, thus owning property and doing business in this State, it is subject to the same regulations and restrictions, which apply to corporations organized under a charter granted by the State of Illinois. Section 28 of the Illinois act in regard to corporations, provides, that "foreign corporations and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character, organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State, except as provided for in this act." Section 5 of the Illinois act in regard to corporations provides, that corporations, formed thereunder, "may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation." As foreign corporations and their officers and agents, doing business in this State, are subject to the liabilities and restrictions of domestic cor-

porations of like character, and as domestic corporations are allowed to sell and dispose of the real and personal property used by them for the transaction of their business, when not required for the uses of the corporation, it follows that foreign corporations may sell and dispose of the real and personal estate necessary for the transaction of their business, when the same is not required for the uses of the corporation. There is no allegation in the pleadings in this case, and no testimony tending to prove, that the property of the American Glucose Company at Peoria was not required for the uses of that company. On the contrary, the proof tends to show that the property was required by the company for the business there conducted. As has already been stated, the company was in a solvent condition, and was doing a prosperous business; the disposition made of its property to a gigantic trust with a capital stock of \$40,000,000.00, was such a disposition as was not authorized by the statute. The act of 1891, which has already been set forth, applies to foreign corporations as well as to domestic corporations; and the act of 1893 above set forth, by providing in section 44 that every foreign corporation, violating any provision of that act, shall be denied the right to do business within this State, impliedly requires the obedience of all foreign corporations, doing business in this State, to the provisions of that act.

. It is the settled doctrine of this State, established by many decisions of this court, that foreign corporations do not come into this State as a matter of legal right, but only by comity, and that said corporations are subject to the same restrictions and duties as corporations formed in this State, and have no other or greater powers. (*Hazelton Boiler Co. v. Tripod Boiler Co.* 142 Ill. 494; *Pennsylvania Co. for Insurance on Lives v. Bauerle*, 143 id. 459; *Bishop v. American Preservers' Co.* 157 id. 284; *Farmers' Loan Co. v. Elevated Railroad Co.* 173 id. 439; *Freie v. Fidelity Building Union*, 166 id. 128; *Rhodes v. Missouri Savings Co.* 173 id.



621). In *Distilling, etc. Co. v. People*, 156 Ill. 448, where the defendant corporation was organized to monopolize the business of manufacturing and selling all distillery products, and the various plants and properties used in that business were transferred to the defendant corporation, we said (p. 491): "The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business." This language applies both to the American Glucose Company and to the Glucose Sugar Refining Company. Foreign corporations cannot be permitted to come into this State for the purpose of asserting rights in contravention of our laws. (*Hazelton Boiler Co. v. Tripod Boiler Co. supra*).

In *Pope v. Hanke*, 155 Ill. 617, it was held, that comity between different States does not require a law of one State to be executed in another when it will be against the public policy of the latter State; that no State is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws; and that a contract made in one State will not be enforced in another when, to do so, would contravene the criminal laws of the latter State, or would be against the express prohibition of its laws. This same doctrine was also announced in *Rhodes v. Missouri Savings Co. supra*.

The proof shows, that nearly all the parties, organizing and engineering the illegal combination known as the Glucose Sugar Refining Company, were citizens of Illinois; and that four of the corporations, which transferred their property to the Glucose Sugar Refining Company, were operating their plants in Illinois at Peoria, Rockford and Chicago. Citizens of Illinois cannot evade the laws of Illinois passed against trusts and combines, and defy the public policy of the State by going into a foreign State, and chartering a corporation to do business in this State in violation of its laws. When these foreign corporations come into this State to do business, they must conform to the laws and public policy of this State. Moreover, the property transferred to Johnson, and through him to the Glucose Sugar Refining Company, consisted largely of real estate, located in Illinois, and nothing is better settled than that the validity of all transactions relating to land depends upon the laws of the State where the land is situated. (*Wunderle v. Wunderle*, 144 Ill. 40). If real estate in Illinois, owned by domestic corporations, cannot be used for the purpose of carrying out the business of an illegal trust or combination, real estate in Illinois, owned by a foreign corporation, cannot be used for such a purpose.

We are, therefore, of the opinion that the fact, that the American Glucose Company and the Glucose Sugar Refining Company were foreign corporations, does not militate against the power of the courts in this State to grant relief under such a bill as is filed in this case.

*Fifth*—One of the features of the transaction, by which the property of the American Glucose Company was taken from it, is the contract entered into on August 11, 1897, between that company and the Glucose Sugar Refining Company. This contract indicates clearly, that the object of the whole scheme was to suppress competition in the manufacture of the products referred to, and to create a monopoly therein. By the terms of that

agreement, the American Glucose Company agreed, that it would not, at any time during the period of twenty-five years from that date, within a radius of fifteen hundred miles of Chicago, engage in the business of buying, manufacturing, or selling glucose, grape sugar, or any of the products produced by any glucose factory; and it was therein recited, that the agreement so to refrain from engaging in such business for the period named was a part of the consideration paid by the Glucose Sugar Refining Company for the purchase of the property of the American Glucose Company. Contracts in total restraint of trade are void; but contracts in restraint of trade are valid, and will be enforced, where the restraint is reasonable, partial, and founded upon a good consideration. In other words, all contracts made in general restraint of trade are void. A contract to refrain from trade throughout an entire State has been held to be general and illegal, while limitation to a particular place is allowable. It has, however, been held that some callings would be treated as being under general restraint, if inhibited by contract throughout the State, while others would not. (3 Am. & Eng. Ency. of Law, p. 882; 9 id. pp. 884-888). Where a contract in restraint of trade is general not to pursue one's trade at all, or not to pursue it in the entire realm or country, the contract is clearly against public policy, and as such is void. (Beach on Monopolies and Industrial Trusts, p. 114, sec. 37). In *Hursen v. Gavin*, 162 Ill. 377, we said: "Undoubtedly, contracts in total restraint of trade are void. \* \* \* A contract in restraint is thus total and general, when, by it, a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or State."

The evidence shows, that the manufacture of glucose and grape sugar and their products is confined to a certain "corn belt," where corn is raised, and that this district is embraced within the territory specified in the

contract of August 11, 1897; that is to say, within a radius of fifteen hundred miles of Chicago. As the evidence in this record tends to show that glucose can only be manufactured successfully within this radius, the agreement not to manufacture and sell it therein amounted, in effect, to an agreement in total or general restraint of trade; hence, the agreement was void, and stamps the transaction, of which it was a part, as illegal.

*Sixth*—The question arises what is the proper judgment to be rendered by this court in this case. As has already been stated, the Glucose Sugar Refining Company filed a demurrer to a part of the bill and an answer to a part. The demurrer was directed against such parts of the bill, as alleged the sale of the property of the American Glucose Company to be a part of one general transaction, which involved the sales of the properties of five other corporations. The answer purports to be directed to those parts of the bill, which specify other features of the transfer of the property of the American Glucose Company outside of the connection of such transfer with the other transfers in question. The main relief sought by the bill is the setting aside of the transfer of the property of the American Glucose Company. It matters not that such transfer is sought to be set aside on several grounds. The relief is the same whatever ground may be relied upon. The answer sets up the fact, that the American Glucose Company is a corporation organized under the laws of New Jersey for the purpose of engaging in the business of manufacturing glucose, etc., and other products of corn in Illinois; it then proceeds to set up the execution of the deeds of the American Glucose Company to Johnson, and of Johnson to the Glucose Sugar Refining Company; and it then alleges, that the latter company paid cash for the premises at the date of the delivery of said deeds. The bill had alleged, that the method of the pool or combination was to swallow up or merge therein the plants engaged in such business in

the United States by issuing to the several corporations, theretofore operating that business, stock in the said pool or combine or in said trust or corporation; and, that where this method failed, its method was to buy such other organizations and plants for cash. The buying of some of the plants for cash when it was necessary, was a part of the method of carrying out the pool or combination. The demurrer, being directed to such parts of the bill as had reference to the formation of the pool or combination, was necessarily directed to those parts which alleged the payment of cash as a method of carrying it out, as well as to those parts which alleged the taking of stock in the new corporation, as the method of securing the properties to be purchased. Hence, the answer was directed to the same part of the bill to which the demurrer was directed. Again, the answer sets up facts, showing that the American Glucose Company relinquished its manufacturing business at Peoria, and transferred its property, through the deeds to Johnson, to a new corporation, organized in New Jersey to do the same business in Illinois, which the American Glucose Company had theretofore done in Illinois. In other words, the answer sets up facts, showing that the American Glucose Company discontinued the business, for which it was created, and surrendered to another corporation its property and the conduct of such business, without alleging in any way that the American Glucose Company was insolvent, or that it was necessary for it so to transfer its business and property. The effect of such transfer was to lessen the number of corporations engaged in the business of manufacturing glucose, because the answer treats the Glucose Sugar Refining Company as an already existing corporation, engaged in the business when the transfer to it was made. If this was so, the American Glucose Company, without cause, suppressed competition in the business to the extent stated. This part of the answer, therefore, was directed to the allegations in re-

gard to the formation of a trust set forth in the bill, and was, therefore, directed to the same part of the bill which was demurred to. Again, the bill was charged by the Glucose Sugar Refining Company to be demurrable upon the ground that it was filed by a stockholder; and the reason, why it is urged that a stockholder cannot file a bill, is, that a stockholder cannot enjoin the sale of the property of a corporation upon the ground that the purchaser intends to violate the criminal law of the State. The answer, however, proceeds to reply to the bill as though it was properly in court, and the stockholder had a right to file it. In other words, the answer concedes what the demurrer denies.

The defendant may not answer and demur also to the same part of the bill. If he demur to a part, and answer to the same part, both cannot stand; the demurrer in such case is overruled by the answer. (*Barbay's Appeal*, 119 Pa. St. 413; 6 Ency. of Pl. & Pr. p. 414). We are inclined to the opinion, that the answer of the Glucose Sugar Refining Company overrules its demurrer in one or more of the respects above referred to.

But whether this is so or not, the Glucose Sugar Refining Company was a purchaser of the property *pendente lite*. Counsel for the Glucose Sugar Refining Company claim that there was a sale of this property to it. It is doubtful, under the evidence, whether there was any sale at all. The deed by the American Glucose Company was made to Johnson, but he swears that it was never delivered to him, and that he never purchased the property. The deed by the American Glucose Company was not made to the Glucose Sugar Refining Company, but was made to Johnson, and a deed is alleged to have been made by him to the Glucose Sugar Refining Company. Johnson received no purchase money, and when he signed the deed, was not aware of the character of the instrument he was signing. The deed made to him, and the deed made by him, were made after this bill was filed,

and after summons was served upon the American Glucose Company. *Lis pendens* begins from the service of the summons or subpoena after the filing of the bill. (*Grant v. Bennett*, 96 Ill. 513). "A purchaser from the defendant while the suit is pending acquires his interest subject to such decree as may be rendered on the hearing." (*Norris v. Ile*, 152 Ill. 190). In *Norris v. Ile*, *supra*, we said (p. 205): "Where there is a purchase *pendente lite*, not only is the purchaser bound by the decree that may be made against the person from whom he derives the title, but the litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit. He is not a necessary party, because his vendor or grantor continues as the representative of his interests, and the plaintiff or complainant may ignore his purchase, and proceed to final decree against the original parties."

Here, the American Glucose Company, and the officers and directors thereof, and the majority of stockholders, withdrew their answers, and submitted to a default; and a decree, confessing all the allegations of the bill, was entered against them. That decree is binding upon the Glucose Sugar Refining Company as a purchaser *pendente lite*. As a decree *pro confesso* was entered against the American Glucose Company, finding such allegations of the bill to be true, as justify the setting aside of the sale of its property, the Glucose Sugar Refining Company, which claims to derive title from the American Glucose Company, is bound by this decree against the latter company.

The decree *pro confesso* is sustained by the testimony in the record. Wilson, counsel for the Glucose Sugar Refining Company, was present at the taking of all the testimony on the part of the complainants below, and cross-examined the witnesses. The interests of the American Glucose Company, and its officers and directors, were one with those of the Glucose Sugar Refining Company.

According to the showing made by this record, as soon as the answers of the former were withdrawn, their counsel at once entered their appearance as solicitors of the latter.

It is true, that counsel for the Glucose Sugar Refining Company refused to allow witnesses to testify upon many material and important matters. Many of these witnesses say, that they declined to answer, simply because Wilson objected to the questions. Two of the counsel in this case refused to answer questions when they were upon the stand as witnesses. As we understand the record, the refusal to answer was not placed upon the ground, that the witnesses would thereby criminate themselves, as showing their violation of the laws of the State against trusts and combines. Their privilege in this regard was not claimed. Nor did the main counsel, when testifying, base the refusal to answer upon the ground that to do so would be to divulge privileged communications. These witnesses were forbidden to answer merely upon the alleged ground that the questions addressed to them called for immaterial testimony. This is no reason why a witness should refuse to answer, where, in the question, no self-crimination or privileged communication is involved. Therefore, the constant objections and refusals to answer, which appear all through this record, amount to an actual obstruction of the administration of justice. The fact of such refusal is to be considered against the defendants, the same as any other refusal to produce evidence, which is within the power of a witness. Such refusal to answer is competent evidence against the witness. (*Andrews v. Freie*, 104 Mass. 234; 29 Am. & Eng. Ency. of Law, p. 846).

But notwithstanding the difficulties thrown in the way of eliciting evidence by these objections and refusals to answer, the record contains sufficient testimony to set aside the transfer made of the property of the American Glucose Company, as the same is above detailed.



Many points are made by counsel for Joseph Firmenich and George Firmenich in their arguments in support of their demurrer to the bill. But, in view of the disposition of the case so far as the Firmenichs are concerned, which is hereinafter made, it is unnecessary to notice these points. Allegations of the bill which concern the Firmenichs are few and meagre. Counsel for plaintiffs in error consents in his brief, that the bill may be dismissed as to the Firmenichs.

So far as the Illinois Trust and Savings Bank is concerned, it claims to have no interest in the transaction, except as a repository, and holder in escrow of the papers of all the parties concerned.

Therefore, we are inclined to think, that whatever error the circuit court committed in sustaining the demurrer of the Firmenichs and of the bank is not sufficient to justify a reversal and remandment of the cause for the purpose of allowing them to answer the bill.

The decree of the court below, dismissing the bill, is reversed, and the cause is remanded to the circuit court of Peoria county, with instructions to dismiss the bill as to Joseph Firmenich and George Firmenich, and the Illinois Trust and Savings Bank, and to enter a decree, setting aside the deed of the American Glucose Company to Edwin L. Johnson, and the deed executed by Edwin L. Johnson to the Glucose Sugar Refining Company, and all the contracts, assignments, and other instruments, accompanying the delivery of those deeds, so far as the American Glucose Company and its directors and officers and stockholders are concerned, and to grant such other and further relief as is consistent with the prayer of the bill, and as is sustained by the evidence already in the record.

*Reversed and remanded with directions.*

GEORGE W. RAGAIN

v.

GRANVILLE E. STOUT.

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*Opinion filed October 16, 1899—Rehearing denied December 9, 1899.*

1. LICENSES—*license to cut timber carries no interest in the realty.* A license to enter upon land and clear it from timber carries no interest in the realty, and is revocable at the will of the licensor.

2. TRESPASS—*licensee continuing work after revocation of license is a trespasser.* One who lawfully enters upon the land of another in pursuance of a license to cut timber becomes a trespasser by continuing the work after revocation of the license.

3. SAME—*when verdict in trespass will not be disturbed.* A finding of the jury in an action for trespass, which places the disputed boundary line in accordance with that established by four surveys made by three different surveyors, will not be disturbed where the line contended for by the defeated party was based on two surveys made by the same person.

APPEAL from the Circuit Court of Johnson county;  
the Hon. JOSEPH P. ROBARTS, Judge, presiding.

Prior to June 18, 1883, appellee owned one hundred and sixty acres of land in Johnson county, being the east half of the north-east quarter of section 23 and the west half of the north-west quarter of section 24, in township 12, south, range 3, east. On the above mentioned date appellee conveyed to John S. Whiteside the west half of the north-west quarter of section 24, above named. In December, 1885, Whiteside conveyed the eighty acres to the appellant. Prior to the first conveyance above mentioned a survey of the line between sections 23 and 24 was made and a rail fence placed on the line of the survey. Subsequently to the first conveyance mentioned another survey was made, which conformed to the first survey. The survey as thus made was recognized and treated as the line between the two tracts, and about 1890 a new division fence was made between the two tracts, each owner making one-half thereof. In May, 1895, a

highway was being laid out along the south line of appellee's tract and a surveyor was employed to make a survey of this highway, and in determining the line of the highway he made a survey of the line between the two tracts above described, and by the survey made the line some ten or twelve feet west of the former surveys, making it to that extent on appellee's land. After the conveyance first above mentioned, and up to this period when the survey was made of the highway, the rail fence had been treated as being on the line by appellee and his grantee, Whiteside, as also by appellee and appellant, and when they constructed the fences, in 1890, on the same line on which the rail fence had been, each continued to occupy and was in possession of the land on their respective sides to the fence. Subsequently to the survey as made at the time the highway was laid out, appellee had two surveys made by the county surveyor, who in each case located the line substantially the same as the two surveys that had been made before the highway was surveyed and which had been acted on in building the fences. Appellant had the same surveyor who surveyed the highway again survey the line, and he again located it some ten or twelve feet on appellee, the same as by his former survey. Appellant cleared up the strip of land to the extent of ten or twelve feet in width on appellee's land, and whilst engaged in the work was by appellee ordered to desist therefrom and to cease clearing up the same, but, ignoring appellee's objection, he continued the work, when again appellee went to him and forbade his clearing up or working up the timber cut down by him. The appellant declared his purpose of constructing a fence on the line of the survey that was made on appellee's land some ten or twelve feet, when appellee brought this action before a justice of the peace and recovered judgment, which was appealed to the circuit court of Johnson county, where a trial was had. No written pleadings were had, but the action is clearly trespass by the plain-

tiff, and the defense was license and *liberum tenementum*. On trial a verdict and judgment were entered for appellee for nominal damages, and appellant prosecutes an appeal to this court.

THOMAS H. SHERIDAN, for appellant.

WHITNEL & GILLESPIE, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

It cannot be doubted that the appellee was in the quiet and peaceable possession of the land on the west side of the fence as it had stood prior to the institution of the suit, and that that possession was invaded by appellant. This, of itself, standing alone, would make a *prima facie* case against the appellant. As a matter of defense the appellant insists that he entered by the license and permission of appellee. Such a defense admits possession in plaintiff and that defendant did the act complained of, and simply puts in issue whether the act was done with plaintiff's consent. Such a license as claimed by appellant carries no interest in the realty, and is revocable at the will of the person who grants the license. (*Woodward v. Seely*, 11 Ill. 157; *Kimball v. Custer*, 73 id. 389; *Simpson v. Wright*, 21 Ill. App. 67; *Stoddard v. Filgar*, 21 id. 560.) Without entering into a discussion of the question as to whether the appellant originally entered by the license of appellee, the uncontradicted evidence shows that, even if a license was ever granted, it was revoked by the appellee and appellant forbidden to further prosecute the work or to further trespass on him, but that, regardless of the act of the appellee, the appellant continued to clear up the land and refused to desist from so doing, and declared a purpose of clearing up the land and to remove his fence to what he claimed was the line. Even if appellant lawfully entered on the

land at the commencement of the work, his continuing to work after the license was revoked would constitute him a trespasser, so that under the claim of license no defense could exist in favor of appellant.

There is no question but that the title was in the respective parties to the tracts of land respectively claimed by them, and such title is shown by the record. The controversy in reality is over the question as to what constitutes the true line of the survey. Four surveys were made by three different surveyors, who placed the line at the point where the fences were constructed. One of these surveys was made prior to 1883, another was made when appellant's grantor was the owner of one tract, and two others were made after 1895. Two surveys were made by the same surveyor, who placed the line at the point where it is contended by appellant that it should be established. There is conflict in the testimony on this question of fact, but from an examination of the record it is clear that the weight of evidence is with the finding of the jury, and clearly authorizes the verdict and judgment as entered. There is nothing in the record that would authorize us to disturb the verdict on this question.

Complaint is made as to the giving and refusing of instructions. A great many instructions were given on each side as to the different phases of the case, and without entering into an extended discussion of these instructions, which would extend this opinion to an unreasonable length, it is sufficient to say that the instructions, as a series, correctly stated the law and were not misleading.

The judgment of the circuit court of Johnson county is affirmed.

*Judgment affirmed.*

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